U.S. Department of Justice
Office of Justice Programs
National Institute of Justice

Civil Protection Orders: Legislation, Current Court Practice, and Enforcement

by

Peter Finn

and

Sarah Colson

March 1990

Issues and Practices in Criminal Justice is a publication series of the National Institute of Justice. Designed for the criminal justice professional, each *Issues and Practices* report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion in the subject. The intent is to provide criminal justice managers and administrators with the information to make informed choices in planning, implementing and improving programs and practice.

Prepared for the National Institute of Justice, U.S. Department of Justice by Abt Associates Inc., under contract #OJP-86-C-002. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

The following individuals provided information and assistance in the conduct of this study:

Advisory Panel

Jane R. Chapman
President
Center for Women Policy Studies
Chevy Chase, Maryland

Lisa G. Lerman
Assistant Professor
Catholic University of America
Columbus School of Law
Washington, D.C.

The Honorable Gladys Kessler
Superior Court of the
District of Columbia
Washington, D.C.

Ellen Pence
Director
Minnesota Program Development, Inc.
Domestic Abuse Intervention Project
Duluth, Minnesota

The Honorable Barbara T. Yanick
Municipal Court of Seattle
Seattle, Washington

Program Monitor

Carol Petrie
National Institute of Justice
Washington, D.C.

Foreword

Today, acts of domestic violence are increasingly recognized for what they are: serious crimes deserving a serious response by the criminal justice system. Family ties do not mitigate the fact that domestic violence involves intimidation, physical injury, and sometimes even death. And because they threaten the future of a family unit, these crimes have serious consequences for every community.

Research on domestic violence indicates that action by the criminal justice system against the batterer may significantly reduce the likelihood of future violence against the victim. It seems clear that, without a clear signal that their behavior is illegal, batterers feel empowered to continue to harm their victims.

Now, a relatively new tool – civil protection orders – expands the range of judicial power to protect victims from the threat of batterers. Properly used and enforced, protection orders give judges the power to show unequivocally that domestic violence will not be tolerated.

Protection orders can be issued immediately on a temporary *ex parte* basis and help provide a safe location for the victim, if necessary by barring or evicting the offender from the household. In addition, they give victims an option other than filing a criminal complaint against a family member, a course of action many victims resist.

The potential benefits of civil protection orders have led to their increasing use throughout the country. Now 48 states and the District of Columbia authorize such orders by statute. This report has been developed to explore current concerns involved in issuing and enforcing orders. The report draws from actual practice in seven jurisdictions, as well as interviews with criminal justice professionals and a 50-state legislative and case law review.

The recommendations presented here can help judges devise guidelines for issuing and enforcing protection orders, guidelines that will support the justice system's goal of protecting victims while ensuring that procedures are constitutionally sound.

James K. Stewart
Director
National Institute of Justice

Preface

The primary purpose of this report is to explain how sitting county and municipal court judges can effectively use and enforce civil protection orders to protect victims of domestic violence. The report provides (1) the statutory basis in each state for issuing various types of relief, (2) a summary of case law upholding the constitutionality of these statutes, and (3) descriptions of how judges issue and enforce orders in nine jurisdictions across the country. In addition to judges, the report will also be useful to court administrators and clerks, advocacy groups, victim assistance programs, and protective shelter staff. Legislators, law enforcement administrators, and trainers who are concerned with reducing domestic violence may find the report of value as well.

For the lay reader, a brief definition of a civil protection order may be helpful. A civil order of protection is a legally binding court order that prohibits an individual who has committed an act of domestic violence from further abusing the victim. Depending on the provisions of the applicable state statute, the order may also forbid the offender from engaging in other behavior (e.g., having any contact with the victim) or specify the conditions of certain activity by the offender (e.g., visitation rights). Civil protection orders are issued in a civil proceeding (although not necessarily in civil court) in response to a written petition from the victim requesting an order.

Information for the report comes from four sources: a review of pertinent state statutes and case law; telephone interviews with twelve judges and twelve victim advocates; examination of program documentation in two sites (Duluth, Minnesota, and Seattle, Washington); and site visits to seven other jurisdictions. Site visits were made to Portland, Maine, and Portland, Oregon; Springfield and Chicago, Illinois; and Nashville, Philadelphia, and Colorado Springs. The sites were chosen to represent a range of reportedly effective approaches. The site visits involved personal interviews with judges, prosecutors, law enforcement officers, women's advocates, and battered women; courtroom observation; and (in two sites) ride-alongs with police officers.

The report has five chapters. Chapter 1 presents the advantages and limitations of civil protection orders. Chapter 2 reviews state statutes that provide the legal basis for issuing and enforcing civil protection orders. The process for petitioning for an order is discussed in Chapter 3. Chapter 4 describes the types of relief authorized by state statute and reaffirmed on appeal. Chapter 5 examines the components of an effective court policy designed to ensure that orders are enforced and violators are punished.

Acknowledgements

We wish to thank the many individuals in the study sites who patiently answered our questions and sent us materials about the use and enforcement of civil protection orders. The following advisory board members provided very useful comments as part of a one-day meeting in Washington, D.C., periodic phone consultations, and reviews of the report outline and draft report: Jane R. Chapman, Gladys Kessler, Lisa G. Lerman, Ellen Pence, and Barbara T. Yanick.

Lisa Lerman helped us adapt the statutory matrix in Chapter 2 from a more detailed matrix she co-authored in 1983 for the Center for Women Policy Studies. She also suggested and helped arrange a 50-state verification of the information in the matrix, and provided repeated expert commentary in the complex area of police arrest powers.

Ellen Pence accompanied us on two of the site visits, participating fully in the interview process, and on numerous occasions she shared with us her extensive experience with the civil protection order process in Duluth, Minnesota.

We also thank Judith Armatta from Portland, Oregon, Bill Edmunds from Colorado Springs, Amy Hartlyn from Nashville, and Betsy Marsano from Portland, Maine, for arranging on-site interviews. We are grateful to the battered women in several sites who described their experiences with civil protection orders.

Cynthia Carlson conducted the statutory review. Taylor McNeil made the calls to each of the respondents in the 50 states for the statutory verification and revised the matrix based on the information we received. Gail Goolkasian provided many useful recommendations in the design phase of the project and proposed a number of wise organizational and substantive changes to the draft report. Marianne Takas provided a variety of valuable additions to the draft report and also edited and reorganized portions of the report to improve its readability and usefulness.

Mary-Ellen Perry, Andrew Blickenderfer, and Catherine Viscovich efficiently typed the numerous drafts.

Carol Petrie, Program Manager in the National Institute of Justice, conceived of the study, joined us in most of the site visits, and played a major role in reviewing and revising all project plans and the draft report.

Peter Finn
Sarah Colson
Cambridge, Massachusetts
October 1989

Table of Contents

List of Tables

List of Figures

Chapter 1: Civil Protection Orders: A Unique Opportunity for Court Intervention

Domestic violence is a widespread form of crime which often is not easily addressed by traditional criminal justice solutions. A lenient response by the court could encourage an offender to believe that violence against a family member is a private or acceptable behavior, while a jail sentence could punish not only the offender but also the victim by depriving the family of needed financial and parental support. Additionally, the unusual access which an offender may have to the victim in domestic violence cases can create an immediate risk of further violence by an offender who is angered at having been "exposed" in a criminal court proceeding or who wants to discourage the victim from further using the justice system. Given these dynamics, traditional criminal justice practices such as pre-trial release or probation which might not create an unreasonable risk to the victim of a stranger assault could be dangerous or even deadly in a family case—unless appropriate protective measures are provided.

Civil protection orders, now available by statute in forty-eight states and the District of Columbia,[1] offer judges a unique additional tool for responding to the special difficulties of domestic violence cases. Properly used and enforced, protection orders can help prevent specific behaviors such as harassment or threats which could lead to future violence. They also can help provide a safe location for the victim, if necessary, by barring or evicting an offender from the household, and establish safe conditions for any future interactions, for example, supervised child visitation.

In most states, protection orders can be provided as a remedy either in addition or as an alternative to pre-existing criminal or divorce-related remedies, thus expanding the total range of judicial powers available. Furthermore, case law, while sparse, has consistently supported the use of protection orders.

In part because domestic violence protection orders are relatively new as an available judicial response, questions have been raised both within and outside the justice system as to whether and how they can truly be effective. Hailed by some as a groundbreaking advance in reducing domestic violence, protection orders have also been criticized as reinforcing a "soft" approach to a serious criminal problem, as being susceptible to fraud, due process, or equal protection violations, and as being difficult both to draft and enforce. Contributing to these concerns is an information gap: to date, no published study has scientifically evaluated the effectiveness of civil protection orders in reducing domestic violence.

Civil Protection Orders Can Work

The whole subject of protection orders is detailed and complex from a legal standpoint. This volume attempts to clarify the legal and procedural issues involved in issuing and enforcing orders so that judges can develop their own guidelines for when to issue them and how to enforce them based on statutory authorization, available case law, and local court procedures. The report is based on a study involving a 50-state legislative and case law review, interviews with a range of judicial and other criminal justice personnel, examination of program documentation, and site visits to seven jurisdictions.

Our research suggests that protection orders can provide a workable option for many victims seeking protection from further abuse. Furthermore, it appears that when protection orders offer only weak protection, the principal explanation may lie in the functioning of the justice system rather than the nature of protection orders as a remedy. Several jurisdictions we examined have shown that changes in the justice system's handling of protection orders can significantly increase their utility. Specifically, we found the following:

(1) *Many victims seek civil protection orders to prevent future battering, choosing this course either instead of or in addition to filing a criminal complaint or seeking some form of legal separation.* In Chicago alone, 9,000 protection orders and extensions of orders were issued in 1987. Portland, Oregon, issues over 4,000 orders per year; Milwaukee, 3,000; and Tuscon, 1,000.

(2) *With thousands of victims petitioning for protection orders, judges have a unique opportunity to intervene in domestic violence cases.* For those victims who petition early, as violence begins to escalate, judges can structure needed protection before such crime can lead to serious injury or death.

(3) *Protection orders, when properly drafted and enforced, were considered effective in eliminating or reducing abuse by most of the judges, victim advocates, and victims interviewed.*[2] Advantages cited included the ability to monitor and punish repeated harassment or assaults, to intervene quickly in emergency situations, and to protect the victim in cases where immediate imprisonment of the offender was impossible, unwarranted, or not desired by the petitioner.

(4) *However, the utility of protection orders may depend on whether they provide the requested relief in specific detail.* Unfortunately, there are few guidelines for judges to use in interpreting the statutes and determining which types of relief are authorized and appropriate for which victims.

(5) *The utility of civil protection orders also is determined largely by whether they are consistently enforced.* In jurisdictions such as Duluth and Philadelphia, where judges have established a formal policy that offenders who violate an order will be apprehended and punished, often with a jail term, both judges and victim advocates report the highest level of satisfaction with the system.

(6) Despite the widespread belief that the effectiveness of civil protection orders depends largely on their enforceability, *few of the courts we studied have developed guidelines or procedures for punishing violators.* As a result, there remains a great deal of confusion with regard to arrest authority and appropriate sanctions for protection order violations.

Even though many—perhaps most—judges and law enforcement officers may be uncertain about their enforcement powers in this area, it is clear that, if used properly, civil protection orders can enhance public safety by expanding the authority of the police to make appropriate arrests in cases of domestic violence. The uncertainty in these cases stems from a longstanding, general legal prohibition against making a warrantless arrest for any misdemeanor, from joyriding to petty theft, unless it occurs in an officer's presence. Until the early 1980's, this prohibition included so-called "minor" domestic violence. However, in recent years, exceptions have been made by statute, allowing a warrantless arrest for misdemeanor domestic violence in 23 states.[3] Furthermore, in 40 states, by statute, a violation of a protection order constitutes either a misdemeanor or criminal contempt. In these jurisdictions, police may arrest an offender for violating any aspect of a protection order the officer witnesses, for example, the offender's mere presence on the premises, even if no violence has occurred. However, despite these statutory changes, enforcement remains procedurally and professionally complex for police and courts alike. This topic is discussed in greater depth in Chapter 5.

Advantages of Civil Protection Orders

Civil protection orders are part of a panoply of remedies to intervene in and prevent domestic abuse, with each remedy offering its distinct advantages and drawbacks. Protection orders have the potential to enable judges to reduce violence against victims of domestic abuse by enjoining offenders from further assaults. These orders further enhance the court's power to reduce violence by authorizing judges to bar the offender from the victim's home or evict him from a shared residence, arrange for temporary custody of children, limit child visitation rights, require payment of child support, and mandate the batterer to attend counseling.

In an emergency situation—for example, where notification of the defendant prior to hearing on a protection order petition could create a risk of immediate retaliatory violence—temporary orders may be obtained in an ex parte proceeding. Under the typical statute, the temporary order lasts for only a very limited time (e.g., ten days), during which time the defendant must be served with notice. After the defendant receives notice, the court holds a hearing at which both parties have an opportunity to be heard. At the conclusion of the hearing, the temporary order may become "permanent," usually for a year or more.

In addition to expanding police arrest powers in the manner noted above, protection orders can provide a means for law enforcement agencies to monitor repeat offenders and intervene effectively. Civil protection order statutes in 28 states require police departments to establish a system by which officers in the field can radio the station to learn whether a victim has a valid order in effect.[4] (In contrast, orders issued as part of a criminal proceeding generally are not logged into the police computer.) In addition, some police officers report that, when called to a domestic violence complaint, they are more likely to arrest the offender if there is a protection order already in effect.

The remedies provided by protection order legislation are separate from and not replicated by existing divorce and separation procedures. Even if the victim plans to file for divorce, a civil protection order may be needed because the victim's only recourse if the respondent violates the divorce conditions is to return to court to petition for a hearing. The immediate enforcement available with a protection order is crucial because, absent effective protection, the danger of abuse may increase rather than decrease directly after separation. Indeed, in up to three-quarters of domestic assaults reported to law enforcement agencies, the victim is already divorced or separated at the time of the incident.[5] Similarly, a study of emergency room records showed that 72 percent of the victims of domestic violence in the sample were separated from the assailant at the time of the injury.[6] Divorce and separation proceedings are also not applicable to the significant minority of family violence cases that involve adult children abusing a parent.

Civil protection order remedies are also distinct from and supplementary to criminal justice remedies. While an unknown percentage of domestic violence cases involve life-threatening levels of violence, others (particularly where the violent behavior is just beginning) do not. Civil protection orders provide the most effective remedy for abuse which,

although serious in its long-range potential for harm, is of unclear or borderline criminality. Such abuse may include, for example:

- Conduct which is not criminal (e.g., harassment);
- Conduct which constitutes a misdemeanor crime but might not justify the time needed for a full trial or might not present sufficient evidence for charging or conviction (e.g., threats, shoving); and
- Cases in which the victim cannot serve as a strong prosecution witness (e.g., due to age, illness, or alcohol problems).

Criminal prosecution can be unsatisfactory as a single solution, too, because it may take many months before the case comes to trial, whereas a protection order can be issued immediately. Furthermore, while in most jurisdictions a protection order can be issued as a condition of bail, pre-trial release, or probation in a criminal case, law enforcement officers cannot usually arrest a person who violates his conditions of release or probation. In addition, the standard of proof in a criminal trial is higher than in a civil proceeding. Finally, in many instances juries will convict batterers only if there has been a significant level of violence.

Except in New York state, petitioning for a protection order does not preclude a victim from bringing criminal charges against the offender at the same time. Some judges recommend that victims of serious domestic violence consider pursuing their cases both civilly and criminally, at least in cases where there has been aggravated assault and battery or other felonious behavior. Indeed, the fastest and easiest way to obtain a civil protection order in Chicago is to file a criminal complaint and petition for an order at the same time. (See Centralized Court Administration in Chapter 3, The Petitioning Process.)

In cases where there is an ongoing criminal prosecution, protection orders may help protect the integrity of the judicial process by helping to prevent the opportunity for retaliation, intimidation, or undue influence on the complaining witness. In contrast to stranger-to-stranger crimes, the criminal defendant in a family-based crime will often have both a strong sense of having been wronged and easier means to retaliate against the victim. In addition, longstanding emotional ties and socialization factors can play havoc with the criminal justice goals of punishing the offender and deterring future crime. These factors may influence a victim to downplay the level of violence she is experiencing or to withdraw as a prosecution witness. These dynamics also may come into play when the case involves abuse of a parent by an adult child. By enjoining any contact and evicting the batterer from the home, civil protection orders can often address these unique circumstances of criminal assault between intimates and thereby increase the likelihood that the criminal prosecution will proceed.

However, many victims do not want the offender charged criminally or jailed, for example because he provides needed family support or has agreed to seek counseling. In addition, many victims are fearful of entering into an adversarial procedure against an abuser. For these victims, civil protection orders may offer the only satisfactory form of protection.

Concerns and Potential Limitations

Many judges express concern over the due process rights of the defendant in a protection order proceeding. However, judges in courts with clearly defined procedures for notice and hearing believe they have adequately addressed these concerns. Furthermore, due process safeguards provided for by statute have been ruled adequate by each of the appellate courts which have ruled on the issue. (See Chapters 2 and 4.)

The common concern that defendants may view protection orders as a "soft" approach to a serious crime has also been adequately addressed in courts where enforcement of orders is swift and certain. Offenders who understand that they will likely be punished for violating an order will not view the approach as "soft," whether the setting is a criminal court or a civil one. Additionally, since many victims who seek civil protection orders are unwilling to initiate a criminal complaint, the civil court setting may properly be viewed in many cases not as "softer" than the criminal court but as "tougher" than no court intervention at all. For many offenders, merely having to appear in court at all can serve as a shocking notice that the victim will not tolerate further abuse.

The most serious limitation of civil protection orders observed in the study, however, is widespread lack of enforcement. In the common case in which an offender violates a protection order and then flees before the police arrive, most officers—even when they have legal authority—do not pursue the offender (if a warrantless arrest is permitted by statute) or obtain an arrest warrant. Although victims have the right to return to court to seek enforcement through a contempt action, they must first obtain legal counsel, since the defendant at this point has the right to representation by an attorney. Even if the victim does seek a contempt action, the case may be viewed as less serious than cases that involve a police arrest. In addition, in both arrest and non arrest cases, some judges appear hesitant to order jail time or other punishments for even serious repeat offenders. This hesitance, while understandable in light of the traditional view of the parties to civil and domestic relations cases as having equally valid concerns, may undermine law enforcement effectiveness and may increase the danger of continued violence to the victim. However, as explained in Chapter 5, Enforcement of Orders, judges and police can collaborate effectively to

ensure consistent punishment of offenders who violate a protection order.

Judges' Changing Perspective on Civil Protection Orders

Several judges interviewed for this study who now regard civil protection orders as an important tool for protecting victims of domestic violence report that they first had to change their view of domestic abuse. While they originally thought that domestic violence consisted primarily of verbal harassment or a rare shove, or as a "relationship problem" amenable to marriage counseling, they later came to see it as a complex problem of persistent intimidation and physical injury—in short, as a violent crime as serious as any other assault and battery.

Several studies support this new perception of domestic violence. One-third of the domestic violence incidents against women recorded in the Bureau of Justice Statistics' National Crime Survey would be classified by police as "rape," "robbery," or "aggravated assault"—all felonies in most states. The remaining two-thirds would likely be classified as "simple assault" (a misdemeanor)—yet as many as half of these "simple assaults" actually involved bodily injury at least as serious as the injury inflicted in 90 percent of all robberies and aggravated assaults.[7] This is because robberies and aggravated assaults may involve little or no violence, but if a firearm is used in the commission of the crime, by law the offense may or must be charged as a felony. Ironically, when domestic abuse incidents do involve little or no violence but the offender has threatened the victim with a firearm, these cases frequently still get charged as only a misdemeanor even though a felony charge is warranted or even required.[8]

More dramatically, according to the FBI Uniform Crime Reports 30 percent of all female murder victims in 1986 were killed by their husbands or boyfriends.[9] State-level studies also show that domestic violence leads to many deaths. Forty-five percent of female homicide victims in California were killed by a family member or boyfriend.[10] In Massachusetts, a woman is murdered by her husband or boyfriend every 22 days.[11] Although domestic violence accounts for only a small percentage of the total number of homicides involving male victims, it accounts for a nearly equal number of deaths of male and female victims in some communities.[12]

In addition to changing their view about the nature and seriousness of domestic violence, the judges we interviewed reported a change in their perception of the court's proper approach in handling civil protection order petitions. They no longer view the hearings either as an extension of divorce court, in which a negotiated settlement of a private problem is called for, or as similar to juvenile court proceedings, in which family unity is a principal objective. Instead, these judges now view civil protection order proceedings as the application of an immediate civil remedy to criminal behavior. They see the hearing as presenting a duty to determine (1) whether a crime has occurred (including a threat of serious bodily injury) and (2) what the court can do to protect the victim from further criminal assault.

This does not mean that judges currently have or will ever have no difficulties using civil protection orders. At a minimum, issuing effective and valid orders requires developing a working knowledge of the state civil protection order statute; developing guidelines for granting various types of relief; and developing procedures for enforcement and the use of appropriate sanctions for violations. Above all, domestic violence cases are complicated: many victims seeking protection orders have been seriously assaulted; others have not but, fearful of the dangerousness of their situation, petition to enjoin borderline behavior and prevent a more serious assault from occurring. Judges must make decisions in cases which fall all along this continuum.

Nonetheless, civil protection orders are seen as a simple, immediate remedy to increase the safety of victims in many of these cases. Because protection orders are temporary, they provide the court an opportunity to "get a handle" on the violent behavior. In issuing orders, judges can err, if at all, on the side of safety by effectively protecting the party in danger of injury, while at the same time allowing the parties and the courts to deal with the complexities of the domestic situation in more appropriate forums. Erring on the side of safety is also important to help protect the children, who are not only at risk of physical and emotional abuse by the offender but may also suffer from witnessing violence within their own home.

The remaining chapters of this volume are designed to help judges to issue orders that can accomplish these objectives. Chapters 2, 3, and 4 discuss the judicial means for insuring a complete, appropriately tailored, and valid order. Guidelines for fair but effective enforcement, modeled on the methods proven most useful in the jurisdictions studied, are discussed in Chapter 5.

Endnotes

1. Only Arkansas and Delaware do not currently have protection order statutes.
2. This viewpoint was widely held by most of the twenty-two judges, thirty victim advocates, and six domestic violence victims we interviewed. Victims interviewed in other studies have also reported that civil protection orders benefited them. See, for example, Follow-Up Study on Women Who Obtain Restraining Orders (n.d.) (unpublished, available from W.O.M.A.N., Inc., 2940 16th Street, San Francisco, CA 94103), cited in Lisa G. Lerman, A Model State Act: Remedies for Domestic Abuse, *Harvard Journal on Legislation*, 1984, *21*(1), p.70, n.35; Lenore Walker, *The Battered Woman*, (New York: Harper and Row, 1979); and Janice Grav, Jeffrey Fagan, and Sandra Wexler, Restraining Orders for Battered Women: Issues of Access and Efficacy; *Women and Politics*, 1984, 4: pp. 13-28. The last study, however, concluded that protection orders are effective in curtailing abuse only when the previous injuries were not severe.
3. See Chapter 5, Figure 12.
4. Ibid.
5. U.S. Department of Justice. Report to the Nation on Crime and Justice: The Data (Washington, D.C.: Government Printing Office, 1983).
6. E. Stark, A. Flitcraft, D. Zuckerman, A. Grey, J. Robuson, and W. Frazier. Wife Abuse in the Medical Setting. Office of Domestic Violence, U.S. Department of Health and Human Services (Washington, D.C.: 1980), cited in Lisa Lerman, A Model State Act: Remedies for Domestic Abuse. *Harvard Journal on Legislation*, 1984, *2*(1), p.74, n.52.
7. Patrick A. Langan and Christopher A. Innes. Preventing Domestic Violence against Women. Bureau of Justice Statistics Special Report (Washington, D.C.: U.S. Department of Justice, 1986, p.1).
8. Barbara Smith. Non-stranger Violence: The Criminal Court's Response (Washington, D.C.: U.S. Department of Justice, 1983).
9. Federal Bureau of Investigation. Uniform Crime Reports, 1986 (Washington, D.C.), p.11.
10. Esta Soler. Improving the Criminal Justice System's Response to Domestic Violence, National Organization for Victim Assistance *Newsletter*, 1987, *11*(4), p.1.
11. Elba Crespo, Coordinator, Resource Center for the Prevention of Family Violence and Sexual Abuse, Massachusetts Department of Public Health. Personal communication, April 11, 1989.
12. Marc Reidel, Margaret Zahn, and Lois Mock. Nature and Patterns of American Homicide. National Institute of Justice, U.S. Department of Justice (Washington, D.C.: 1985); James A. Mercy and Linda E. Saltzman. Fatal Violence among Spouses in the United States, 1976-85. *American Journal of Public Health*, 1989, *79*(5), 595-599.

Chapter 2: The Legal and Procedural Basis for Civil Protection Orders

Forty-eight states and the District of Columbia have enacted statutes authorizing civil orders of protection for domestic abuse. Only Arkansas and Delaware do not have such a statute.

In the past, problems with the use of civil protection orders often stemmed from lack of clarity and limitations of scope concerning eligible victims, offenses that permit an order of protection, kinds of relief authorized, and provisions for enforcement. As a result, many state statutes have been revised to include more clear-cut, specific, and comprehensive procedures for courts and law enforcement agencies to follow.

The national legislative trend is toward expanded coverage and applicability. Within the past five years, coverage in most states has expanded dramatically. For example, in 1983 only 17 states provided protection against abuse by an unmarried partner living as a spouse; by 1988, that protection was provided in 39 states. Whereas attempted physical abuse was a basis for issuing an order in 29 states in 1983, by 1988 this was a statutorily authorized basis in 40. Remedies available have similarly expanded; the number of states in which a protection order can specify temporary child custody and visitation rights increased from 33 to 41 in those five years.

Figures 1, 2, 3, 4, 9, 11, and 12 present significant provisions of the civil protection order statute of every state and the District of Columbia as of March 1988.[1] (Statutory citations appear in the Appendix.) Examination of these figures, combined with the comments of the twenty-two judges we interviewed and the members of our advisory board, suggests that current problems in the use and enforcement of civil protection orders do not usually reflect deficiencies in the enabling statutes. Indeed, most statutes provide very broad authority for issuing and enforcing orders but are often interpreted more narrowly than intended. This may be due to judicial concerns regarding possible constitutional limits on apparent authority; however, most of the judges interviewed for this study, who are very active in issuing protection orders, were confident that courts are on safe ground interpreting the statutes broadly and enforcing them vigorously. The analysis of statutory provisions which follows supports this viewpoint.

While this study revealed that most statutes provide ample tools for judges to use in protecting victims of domestic violence, it also became clear that coverage in some states is broader and more specific than in others. In general, judges report that the *broader* the statutory coverage and the more *specific* the statutory language, the more efficiently they are able to handle cases and protect victims. This is particularly true in terms of provisions defining eligible petitioners, offenses protected against, remedies available, and mechanisms for enforcement.

The statutory review which follows includes a summary of typical provisions, including the number of states[2] which provide each feature. The experience of courts in addressing the various aspects of protection order procedure is noted where relevant. The practical challenges of effectively utilizing protection order statutes — affording needed protection while avoiding potential statutory or Constitutional pitfalls — are emphasized. However, to make full use of the information provided, judges will need to review the specific statutory provisions of the legislation in their own states. By comparing their statute with those in other states, judges can also assess whether aspects of their own state laws need strengthening.

Eligible Petitioners

Figure 1 presents provisions by state regarding eligibility to petition for a protection order. As the data show state statutes differ with regard to indicating who is eligible to petition for a protection order in two respects. First, statutes vary considerably in the latitude they provide judges in determining who is eligible, ranging from the very broad to the very narrow. Second, some statutes are very specific in providing definitions of who is eligible (e.g., "adults who are related by blood"), while other statutes employ language that is vague (e.g., "cohabitants"). Statutes that provide broad eligibility make matters easier for the judge because they expand the judge's power to prevent widespread misdemeanor violence among a large number of intimates. Statutes that are specific about who is eligible provide judges with clear guidance in determining which petitioners may be granted relief without fear of Constitutional challenge.

Coverage

The broadest eligibility is provided in those statutes that qualify *any* individual who is currently living with another individual, or who *once* lived with the other individual; persons who have never lived together or been married but who have a child in common; and the minor child of one or both parties. For example, the Minnesota statute makes all of the following eligible for relief:

> " . . . spouses, former spouses, parents and children, persons related by blood, and persons who are

Figure 1 *
Statutory Provisions by State Regarding Petitioner Eligibility for a Protection Order

Eligibility Provisions[1]	Alabama	Alaska	Arizona	California	Colorado	Connecticut	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska
A. Who May Be Covered																									
Spouse	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓[a]	✓	✓	✓
Former spouse		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓[b]	✓	✓	✓
Person living as spouse	✓	✓	✓	✓		✓		✓	✓	✓	✓	✓	✓	✓			✓			✓	✓	✓	✓	✓	✓
Person formerly living as spouse		✓	✓	✓		✓		✓	✓	✓	✓	✓		✓			✓			✓	✓	✓	✓	✓	✓
Family member	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓[c]	✓	✓	✓	✓	✓	✓	✓		✓	✓		✓
Household member related by blood or marriage[2]	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓[d]	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Unrelated household member		✓		✓	✓	✓			✓	✓	✓	✓		✓					✓	✓	✓		e		
Former household member				✓		✓			✓	✓	✓	✓		✓			✓		✓	✓	✓	✓[f]	✓	✓	✓
Persons with a child in common		✓		✓		✓		✓	✓	✓	✓	✓			✓		✓	✓	✓		✓	✓			✓
Minor child of one or both parties	✓	✓	✓	✓		✓		✓	✓		✓			✓	✓	✓	✓	✓	✓	✓	✓	✓			✓
Eligible if victim leaves residence	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓[g]			✓	✓	✓	✓	✓
Self-defense permitted										✓	✓						✓	✓							
B. Who May Petition																									
Victim	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Adult household member for minor	✓	✓				✓			✓		✓			✓	✓	✓	✓	✓			✓	✓			

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault,* Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.
2. "Household members related by blood or marriage" is often stated in the law as "persons related by consanguinity or affinity," or in some states as "relatives." Consanguinity refers to blood relatives and affinity includes spouses and in-laws. Many of the states listed do not require that persons in this category be living

a. In Mississippi, if parties are spouses, a petition for relief must state that no suit for divorce is pending.
b. In Mississippi, if the petitioner is a former spouse of the respondent, a copy of the decree of divorce must be attached to the petition.
c. Persons qualify in Iowa as long as they are adult members of the same household.
d. Persons qualify under Iowa statute as long as they are adult members of the same household.
e. In Missouri, coverage is for unrelated household members only of the opposite sex.
f. In Mississippi, former household members are covered if they are related.
g. The Maryland statute states that a victim need not be living in the home to apply for a protection order; however, the victim must have been living with the abuser at the time the abuse occurred.

Figure 1 * (continued)

Statutory Provisions by State Regarding Petitioner Eligibility for a Protection Order

Eligibility Provisions[1]	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming	Dist. of Columbia	Total Number of States
A. Who May Be Covered																									
Spouse	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	49
Former spouse	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	46
Person living as spouse	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓		✓	✓	✓	✓	✓	39
Person formerly living as spouse	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓		✓	✓		✓	✓		✓	✓	✓	✓	✓	36
Family member	✓	✓	✓		✓		✓	✓	✓	✓[h]	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓		✓	42
Household member related by blood or marriage[2]	✓	✓		✓			✓	✓	✓	✓[i]	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	43
Unrelated household member	✓						✓		✓		✓	✓[j]			✓	✓	✓			✓		✓	✓		24
Former household member							✓	✓	✓		✓				✓	✓	✓			✓	✓	✓			24
Persons with a child in common	✓		✓	✓	✓		✓	✓		✓	✓	✓	✓	✓		✓				✓	✓			✓	30
Minor child of one or both parties	✓				✓			✓	✓		✓		✓	✓		✓		✓		✓	✓			✓	30
Eligible if victim leaves residence	✓	✓	✓		✓				✓	✓	✓	✓	✓	✓		✓	✓			✓	✓	✓			36
Self-defense permitted			k										✓		✓										6
B. Who May Petition																									
Victim	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓[l]	✓	✓	✓	✓	✓	✓	✓	✓	48
Adult household member for minor	✓				✓			✓	✓		✓	✓	✓		✓	✓		✓		✓	✓	✓	✓		26

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.
2. "Household members related by blood or marriage" is often stated in the law as "persons related by consanguinity or affinity," or in some states as "relatives." Consanguinity refers to blood relatives and affinity includes spouses and in-laws. Many of the states listed do not require that persons in this category be living together.

h. Family members are adults related by blood or marriage, according to Oregon statute.

i. In Oregon, household members related by blood or marriage refers to adults only.

j. In Rhode Island, unrelated household members are eligible for a restraining order if they have lived together within the past twelve months.

k. The Domestic Violence Act of New Jersey makes no mention of self defense. However, domestic violence in the state is defined with reference to sections of the penal code for such offenses as assault, kidnapping, murder, rape, etc. Thus, since those criminal statutes, which are incorporated into the Domestic Violence Act by reference, permit self defense as a defense, the Domestic Violence Act may permit self defense. There is no case law in this area, however.

l. In Texas, a prosecuting attorney may petition for a civil protection order on behalf of a victim.

> presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or have lived together at any time."

Almost as broad are statutes, such as Ohio's, that while excluding persons with a child in common who have never lived together and/or the minor child of one or both parties, still grant the right to petition to "any adult residing, or having resided, within the same residence." Statutes like Alaska's are more restrictive in limiting coverage to only those individuals who are living or previously lived "in a *spousal* relationship with the respondent" [emphasis added]. These statutes expressly exclude household and former household members who were simply living together as family or household members without a long-term intimate relationship.

Still more restrictive are the many statutes which make persons abused by a former partner, former household member, or family member who currently lives in a *separate* residence *in*eligible for relief. Thus, in the Maryland statute, victims are eligible for protection only if the abuser is an immediate family member who is currently living with the victim at the time of abuse. In Pennsylvania and Kansas, a victim may petition for protection against a former cohabitant but only if both the victim and alleged abuser "continue to have legal access to the residence."

Statutes in Texas and West Virginia narrow their coverage by expressly stating that no order may be issued if an action for legal separation or dissolution of marriage is pending between the parties. In Missouri, an existing order of protection is automatically terminated "upon the entry of a decree of dissolution of marriage or legal separation." Virginia's statute is the most restrictive in authorizing relief only to spouses currently living together.

Being able to grant protection orders to victims who no longer live with their partner is particularly important. As noted in Chapter One, about three-fourths of law enforcement reports – as well as hospital emergency reports – of domestic violence occur in cases in which the victim is *not* currently residing with the abuser, either because the parties are divorced or separated, or because the parties never lived together.[3] Thus, the mere fact that the parties have separated or that a divorce is pending or completed will not invalidate the need for protection of a vulnerable party. Indeed, many batterers who kill their partners do so precisely at the time the woman is in the process of separating from them.

In addition, many victims have left their residence to escape being beaten and are living elsewhere at the time they petition for an order. Recognizing this, protection order statutes in 36 jurisdictions affirmatively provide that a petitioner's eligibility will not be affected if she leaves the domicile to escape the abuse. Thus, in Colorado (where a person abused by an unrelated former household member would ordinarily not be eligible for relief), a person who has fled a household but continued to be abused in her new residence may petition for relief.

Specificity

Virtually all statutes which extend coverage to "family members" or "household members" define the terms very broadly. For example, the Illinois statute states that "'Family or household members' means spouses, individuals who were former spouses, individuals sharing a common household, parents and children, or persons related by blood or marriage."

Despite such broad coverage, judges may still have to exercise discretion in determining who is eligible for relief. For example, while only a few statutes explicitly deny protection to victims in the process of getting a divorce or separation from the batterer, most other statutes are simply silent on the matter. However, a few statutes affirmatively authorize the availability of relief to these individuals. For example, Utah's statute provides that "All proceedings pursuant to this act are separate and independent of any proceedings for divorce, annulment, or separate maintenance, and the remedies provided are in addition to any other available civil or criminal remedies." Minnesota's statute assigns priority to the civil protection order if its provisions conflict with the conditions of a divorce settlement.

Most statutes are also silent on whether an order may be issued to a petitioner who used violence in self-defense against the defendant. However, a few states, such as Tennessee, expressly provide that:

> The petitioner's right to relief . . . shall not be affected by use of such physical force against the respondent as is reasonably believed to be necessary to defend the petitioner or another from imminent physical injury or abuse.

Qualifying Behavior

Figure 2 identifies the type of abuse in each state for which judges are statutorily authorized to issue a protection order. As the figure shows, while petitions may be brought to protect against physical abuse of an adult in all 49 jurisdictions, victims may petition on the basis of threatened physical abuse in only 43 jurisdictions, and attempted physical abuse in only 40.

Some judges are reluctant to exercise their authority to issue an order when threats are alleged but no actual battery has occurred. For example a judge in a state that authorizes protection orders on the basis of threats grants orders only if there have been several threats and the abuser has the ability to carry out his menaces. This reluctance may in part reflect judges' uncertainty about the extent of their authority when

the statutory language regarding "threat" is couched in terms of intimidating the victim. For example, the Maine statute provides that "Abuse" includes "attempting to place or placing another in fear of imminent bodily injury." Like other issues of credibility, of course, the finding of whether a threat has actually occurred is within the discretion of the court.

Statutes in 28 states specifically include sexual assault of an adult as a ground for providing relief. For example, Oregon's statute includes "causing another to engage in involuntary sexual relations by force, threat of force or duress" within the definition of abuse. Sexual assault of a child is expressly included in the definition of abuse in 22 statutes. Moreover, in *Lucke v. Lucke* 300 N.W. 2d 231 (N.D. 1980), the North Dakota Supreme Court ruled that, although the state statute did not expressly include sexual abuse as a ground for issuing an order, the law defining abuse as physical assault or threats of assault should be interpreted to allow relief for sexual assault.

A number of states define domestic violence to include "malicious damage to the personal property of the abused party" (Tennessee's wording). The Washington State statute provides that " 'Domestic violence' includes but is not limited to any of the following crimes when committed by one family or household member against another":

- assault in the first, second, third, or fourth degree
- reckless endangerment
- coercion
- burglary in the first and second degree
- malicious mischief in the first, second, or third degree
- unlawful imprisonment.

Most state statutes do not require a victim to petition for a protection order within any specified time limit, nor is there any automatic disqualification due to prolonged delay. However, although of dubious legality, many judges establish their own guidelines in this matter. For example, one judge interviewed will not issue an order unless the most recent incident occurred within the past 48 hours. That stringent a limitation does not appear to have widespread acceptance; many judges reported that they found that victims often need several days or even weeks after the incident to learn about the availability of civil protection orders; to seek encouragement from family, friends, or victim advocates to initiate legal action; and to reach an invariably difficult decision to petition for an order. As a result, judges in other jurisdictions grant orders as long as the incident did not take place more than a month before the petition was filed. Courts in Oregon are permitted by statute to consider women eligible who have been abused any time in the preceding 180 days.

Jurisdiction and Venue

Typically, the class of court or courts having jurisdiction over protection order cases are specifically named in the state statute. In many states, widespread availability of the remedy is encouraged by granting the power to issue protection orders to several different courts, including specialized and relatively accessible lower courts. In Massachusetts, for example, petitioners may seek protection orders in the superior, probate and family, district, or Boston municipal courts. This also allows judges the discretion to issue protection orders as needed to protect parties in pending cases (for example, in a divorce case in probate and family court, a criminal case in district court, or a personal injury suit in superior court).

Personal jurisdiction is obtained over the defendant through service of process. The typical statutory scheme, in line with the requirements of due process, provides that process must be served prior to the hearing on a permanent protection order. If a temporary protection order has been granted on an emergency ex parte basis, it becomes effective only when it is personally served on the defendant; for reasons of efficiency, notice of the temporary order is served contemporaneously with written notice of the hearing date on the permanent order. The crucial function of service, performed in most states by police officers, is addressed in depth in Chapter 6.

Venue is determined in many states by specific directives within the protection order statute. In Texas, for example, the petition may be brought "(1) in the county where the applicant resides; or (2) in the county where an individual alleged to have committed family violence resides." In Utah, the action lies in "the county wherein either party resides or in which the action complained of took place."

Several judges in our study emphasized that determinations of venue should reflect changes in residence caused by a petitioner's need to flee ongoing violence. For example, judges in Multnomah County, Oregon, used to reject petitions for protection orders from women staying at a Portland shelter if neither partner lived in the county and the alleged abuse had not occurred there. This acted to deny effective court access to a highly vulnerable group; as a result, the state court administrator sent a memo to every county court administrator clarifying that local courts do have venue when women from outside their county are temporarily residing at a shelter within their jurisdiction. Similarly, because the Sojourn Women's Center shelter in Springfield, Illinois, serves a multi-county area, the court allows women from other counties who are temporarily residing at Sojourn to use the shelter address in petitioning for a protection order.

> In Massachusetts, this need is explicitly addressed by statute.

Figure 2 *

Statutory Provisions by State Identifying Abuse Which Qualifies for Issuing a Protection Order

Abuse Which Qualifies[1]	Alabama	Alaska	Arizona	California	Colorado	Connecticut	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska
Physical Abuse																									
(a) of an adult	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
(b) of a child	✓	✓	✓	✓		✓		✓	✓	✓	✓			✓	✓	✓	✓	✓	✓		✓	✓			✓
Threat of physical abuse	✓	✓	✓		✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓
Attempt at physical abuse	✓	✓	✓			✓	✓	✓		✓	✓	✓		✓		✓	✓	✓	✓	✓		✓	✓	✓	✓
Sexual Abuse																									
(a) of an adult		✓				✓	✓	✓		✓	✓					✓	✓	✓	✓				✓		
(b) of a child		✓	✓			✓				✓	✓			✓		✓	✓		✓		✓	✓			

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.

Figure 2 * (continued)

Statutory Provisions by State Identifying Abuse Which Qualifies for Issuing a Protection Order

Abuse Which Qualifies[1]	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming	Dist. of Columbia	Total Number of States
Physical Abuse																									
(a) of an adult	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		49
(b) of a child	✓							✓	✓		✓	✓	✓	✓	✓	✓		✓		✓	✓	✓	✓		33
Threat of physical abuse	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓		43
Attempt at physical abuse	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓		✓	✓	✓		40
Sexual Abuse																									
(a) of an adult	✓	✓	✓	✓	✓			✓	✓	✓	✓	✓	✓				✓			✓	✓	✓	✓		28
(b) of a child								✓	✓		✓	✓	✓					✓		✓	✓	✓	✓		22

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault,* Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.

> Proceedings under this chapter shall be filed, heard and determined in the superior court department or the Boston municipal court department or respective divisions of the probate and family or district court departments having venue over the plaintiff's residence. If the plaintiff has left a residence or household to avoid abuse, such plaintiff shall have the option of commencing an action in the court having venue over such prior residence or household, or in the court having venue over the present residence or household.

These options allow maximum flexibility to petitioners, who may choose to file in their present county (for example, if transportation to the prior county is prohibitively difficult) or in the prior county (for example, if they wish to promptly return there once protection is secured).

In some states, venue is not specified within the protection order statute and must be determined by reference to pre-existing rules of civil procedure. In the West Virginia statute, for example, there is no indication as to the proper venue.

Jurisdictional problems regarding enforcement leave some victims with valid protection orders but without police protection, as when a plaintiff moves and courts and police are unclear about how to "transfer" the protection order between counties. Oregon's statute addresses this problem by providing that civil protection orders "shall be fully enforceable in any county in the state." The Nevada statute goes even further by requiring its courts to "accept an order for protection against domestic violence issued by a court *of another state* as evidence of the facts on which it is based and . . . issue its own temporary or extended order as those facts may warrant" [emphasis added].

Some judges stressed the need to address the jurisdictional problems a petitioner might face before the victim leaves the courtroom. For example, in addition to the problems created when victims flee across county lines to escape danger, some women have jobs or other responsibilities that require them to travel to other jurisdictions. These special situations can often be addressed right in the protection order by explicitly prohibiting the respondent from approaching or harassing the victim at home, at work, or in other specified locations.

Standard of Proof

Eleven jurisdictions prescribe by statute that the need for a protection order must be established by "a preponderance of the evidence." Maryland requires "clear and convincing" evidence of abuse and Wisconsin requires "reasonable grounds."

The majority of statutes, however, are silent regarding the proper standard of proof in protection order hearings. Although civil cases ordinarily require a preponderance of the evidence unless otherwise specified by statute, some judges remain uncertain about which civil standard to use in deciding protection order cases. Given the absence of specific guidelines in most civil protection order statutes, judges may wish to examine other civil code provisions in their state to determine the proper rules of evidence that apply.

Procedure for Issuing Permanent and Emergency Orders

In most states, the procedure specified by statute for non-emergency protection order cases is similar to that applied in any other civil matter. The petition is filed in the appropriate court, a hearing date is set, and notice must issue to the defendant within a specified time limit. Because of the pressing nature of domestic violence cases, however, most statutes set relatively quick time limits for notice and hearing (typically, 10 to 20 days). At the conclusion of the hearing, the court may issue a "permanent" order. Figure 3 indicates the maximum duration for which full orders may be issued in each state.

Because the vast majority of cases arise as emergencies, all 49 jurisdictions with protection order legislation provide procedures for temporary orders to be issued on an emergency ex parte basis. (See Figure 3.) To qualify for the ex parte remedy, a petitioner must demonstrate a substantial level of emergency as defined by the statute — for example, "immediate and present danger" of domestic violence; "substantial likelihood of immediate danger;" "irreparable injury is likely or could occur;" and "immediate and present physical danger." While many states limit available remedies in temporary orders to the most immediate safety needs (deferring, for example, more complex matters such as visitation with children or counseling for the defendant), all 49 jurisdictions allow the court to temporarily evict the defendant from the household on an ex parte emergency basis. This temporary eviction does not, however, affect permanent title to property. (See Eviction of the Offender in Chapter 4, Types of Relief, for a full discussion of ex parte eviction, including available case law.)

Once an emergency ex parte order is issued, timely opportunity for hearing must be provided in accordance with the specified statutory scheme. In some states, the hearing is not automatically set, but any defendant desiring relief from the emergency order is given the opportunity to seek a full hearing on an expedited basis. For example, in Oregon, the notice to a respondent subject to an emergency ex parte order includes the following capitalized written information:

> THIS ORDER BECOMES EFFECTIVE IMMEDIATELY. IF YOU WISH TO CONTEST THE CONTINUANCE OF THIS ORDER YOU MUST WRITE TO [applicable clerk's office] AND

REQUEST A HEARING...AT A HEARING A JUDGE WILL DECIDE WHETHER THE ORDER SHOULD BE CANCELLED OR CHANGED. UNTIL SUCH A HEARING, THIS ORDER IS IN EFFECT.

If the respondent does not contest the order, it will last one year (or such shorter period as the court may designate).

In other states, the court itself must schedule the full hearing, or the plaintiff must request it, as soon as the emergency ex parte order is entered; if the hearing is not held (even if due to avoidance of service by the defendant, or the court's own administrative difficulties), the emergency order will automatically expire within a time limit defined by statute or the court. (See Figure 2.) In Indiana, for example, an emergency order expires "(A) when a permanent protective order hearing is granted, or (B) after ten days, *whichever occurs first*" (emphasis added).

The case law analysis in the section on Eviction of the Offender in Chapter 4 reveals that the defendant's due process rights are adequately protected whether the hearing is set automatically or by request of the defendant—so long as prompt opportunity for hearing and relief is in fact provided. However, the model which requires the defendant to request the hearing, leaving undisturbed the emergency order in the interim, has the following advantages:

1) It avoids the possible severe danger to the victim and any children which can occur if an emergency order automatically expires. This is especially crucial because the factors which may delay a hearing (such as difficulty locating the defendant) are largely outside the control of the plaintiff.

2) It preserves judicial resources by not scheduling hearings for cases which are not, in fact, contested. For example, in a recent six month period in Chicago, only three out of several hundred defendants evicted from the home exercised their statutory right to immediately request a hearing. (Under Illinois law, hearings are automatically scheduled, but defendants may obtain a more immediate hearing upon request.) In Springfield, even when defendants are summoned by the court to a hearing to review the temporary order, only one-third appear. It would appear that, if a statutory scheme like Oregon's were instituted, in which hearings are scheduled only on request of the defendant, substantial court and administrative time could be saved.

Despite the apparent advantages of requiring defendants to request hearings before dissolving an emergency order, few states have adopted a statutory scheme similar to the Oregon model. In part, this may reflect a disadvantage of the approach: the rate of compliance with protection orders may be higher if the defendant is required to appear in court where the judge has an opportunity to warn him that a violation may result in jail.

Common Statutory Weaknesses

Many statutes contain provisions that reduce the court's ability to protect victims as completely as possible. Brief mention of these statutory deficiencies follows. As indicated below, each of these weaknesses is addressed in detail elsewhere in this report.

Filing fees. A large number of states have established filing fees specifically for orders of protection or for civil petitions in general, including protection order petitions. While all of these jurisdictions provide for waiving the fee, courts in these states usually include the income of the petitioner's spouse in determining whether the fee can be waived. A fee may discourage some victims from filing. (See Chapter 3, p.19.)

Training for clerks. Many statutes require clerks to assist petitioners seeking an order. Even in jurisdictions without this requirement, clerks typically play a critical screening role in encouraging or dissuading victims from petitioning. However, no statute provides procedures or funds for training and supervising clerks in this sensitive function. (See Chapter 3, p.26.)

Emergency orders. Most domestic violence occurs during the evening or on weekends—when most courts are not in session. Yet, as shown in Figure 3, only 23 states provide for issuing emergency after-hours orders. (See Chapter 3, p.29.)

Service. Most statutes require personal service of protection orders before they become enforceable. However, many defendants are difficult to locate. As a result, victims are unprotected during the days and even weeks until service has been made. (See Chapter 5, p.58.)

Monitoring. Tracking violations is a key to effective enforcement of any civil protection order. Yet only a few state statutes include case tracking to find out whether respondents are complying with the terms of the order. (See Monitoring Compliance, Chapter 5, p.51.)

Enforcement. By making a violation civil contempt rather than criminal contempt or a misdemeanor, or by failing to provide for warrantless arrest for a violation, the enforcement provisions in many state statutes fail to provide law enforcement officers with adequate authorization for arresting respondents who violate the protection order. (See Responding to Violations, Chapter 5, p.55.)

Figure 3 *
Statutory Provisions by State Specifying Protection Order Duration

Duration Provisions[1]	Alabama	Alaska	Arizona	California	Colorado	Connecticut	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska
A. Full Orders																									
Maximum duration (days)	365	90	183	3ys.		90	365	183	180	30	730	5	365	365[a]	365	90	365	30	365		365	365	180	365	
Extendable		b	✓	✓		✓	✓				✓			✓		✓	✓		✓		✓		✓		
B. Ex Parte Relief																									
Available	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Maximum duration (days)	1	20		25		14	30	10	30	14	14	10	10	20	14	30	21	5	5		14	10		20	
Extendable	✓	✓				✓	✓			✓	✓		✓			✓	✓	✓	✓		✓	✓			
Lasts until full hearing held					✓	✓	✓	✓		✓				✓		✓	✓	✓				✓	✓		✓
C. Evening/Weekend Relief																									
Available	✓	✓		✓	✓						✓		✓	✓		✓	✓		✓			✓	✓	✓	
Maximum duration (days)	10	20		c	3						14hs.		3	3		30						10			
Immediate court certification[2]	✓			✓	✓						✓		✓	✓			✓		✓				✓		

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault,* Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned — that is, required, authorized, or prohibited — in the civil protection order statute or in other applicable legislation.
2. Procedures by which the order is signed by a responsible court official and entered into the court's official record keeping system.

a. In Kansas, child support and support of spouse expire in six months, although the plaintiff may request a six month extension.

b. Orders are extendable in Alaska, except for provisions related to child custody and support.

c. In California, the order lasts until the close of business on the next court day.

Figure 3 * (continued)

Statutory Provisions by State Specifying Protection Order Duration

Duration Provisions[1]	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming	Dist. of Columbia	Total Number of States
A. Full Orders																									
Maximum duration (days)		365	d	90	365	365		365	e	365	365	365	183	365	365	365	60	365	365	365	365	730	180	365	
Extendable		✓		✓						✓		✓	✓		✓			✓			✓		✓	✓	22
B. Ex Parte Relief																									
Available	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	49
Maximum duration (days)	30		10			10	30	10		365	365	20		21	f	20	10	10	15	14	5	7	3	14	
Extendable	✓			✓	✓		✓	✓		✓		✓			✓	✓				✓	✓	✓	✓		26
Lasts until full hearing held	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓		✓				✓	✓	✓		✓	✓	✓		29
C. Evening/Weekend Relief																									
Available			✓		✓		✓				✓	✓	✓					✓	✓		✓			✓	23
Maximum duration (days)			10						3		g										5			14	
Immediate court certification[2]			✓				✓				✓	✓						✓							14

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.
2. Procedures by which the order is signed by a responsible court official and entered into the court's official record keeping system.

d. New Jersey provides that a temporary restraining order shall remain in effect until further action by the court.

e. In Oklahoma, final orders do not have a fixed duration but are continuous until modified, until rescinded upon motion by either party, or if the court approves any consent agreement entered into by the plaintiff and defendant.

f. In Tennessee, the ex parte order is effective until a hearing is held. There is no statutory time limitation.

g. In Pennsylvania, evening/weekend relief lasts until the beginning of the next business day of court.

Conclusion

Where statutes have these weaknesses, there are steps judges can take to address these deficiencies. For example, within their own courts, some judges have established a court policy on enforcement of orders that includes admonishing defendants, establishing procedures for modifying orders, promoting – as appropriate – the arrest of violators, and handling violators sternly. (See Chapter 5). Judges can also see to it that court clerks are trained in the proper handling of petitioners. Judges in Seattle bring court clerks together periodically to discuss how to handle difficult cases.

Judges can act outside the court, as well. For example, judges in some jurisdictions have made their own arrangements for providing emergency orders. In conjunction with other officials, judges in several Minnesota cities have implemented effective procedures for monitoring compliance with civil protection orders. Judges can also inform the improvement of their state legislation, most importantly when their experience with orders suggests the need to broaden the categories of eligible petitioners, eliminate filing fees, make a violation a misdemeanor offense, and provide statutorily for emergency orders, training for clerks, and alternatives to personal service.

Despite weaknesses in some state statutes, current legislation in most states provides judges with ample opportunity to use civil protection orders to help protect many women from domestic violence. The following chapters describe in detail how judges in the nine study jurisdictions have used this statutory authority to protect victims from ongoing violence.

Endnotes

1. The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept/Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The content of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in each state in 1988.
2. All numerical totals of "states" or "jurisdictions" in the text and matrix of this report include the District of Columbia where applicable. Thus, for example, since 48 states plus the District of Columbia protect spouses against abuse, the text may state that 49 states (or 49 jurisdictions) provide this protection.
3. See notes 6 and 7 of Chapter One and accompanying text.

Chapter 3: The Petitioning Process

This chapter reviews the most common petitioning pitfalls and suggests ways in which judges have addressed them to provide victims with the maximum legal protection, and yet streamline the process for the court.

Filing Fees

Many observers have expressed concern that 23 states require a filing fee in order to petition for a protection order. (See Figure 4.) While every state but Hawaii permits an indigent victim to have the fee waived, completing the necessary affidavit of indigency can be a discouraging bureaucratic burden. More important, nearly all of these states include the spouse's income in determining a petitioner's eligibility for a fee waiver. A battered woman whose husband controls the family finances should not be expected to ask him for the money.

Because of these problems, statutes in California, Massachusetts, New Hampshire, Oregon, Rhode Island, and Vermont prohibit a filing fee. California's statute was amended to eliminate filing fees when the State Supreme Court Chief Justice proposed this change to help ensure that victims could seek court protection regardless of economic means. An alternative remedy is to exclude the spouse's income in the fee waiver determination. For example, the Washington State statute prescribes that "For the purpose of determining whether a petitioner has the funds available to pay the costs of filing an action under this chapter, the income of the household or family member named as the respondent is not considered." Another improvement would be to establish a simplified procedure for submitting an affidavit of indigency or establish a presumption that anyone on welfare is indigent.

Legal Representation for the Victim

The need for legal counsel

Most judges report that even with a simplified petitioning procedure and energetic lay assistance to victims, those victims who are not represented by counsel are less likely to get protection orders – and, if an order is issued, it is less likely to contain all appropriate provisions regarding exclusion from the residence, temporary custody of children, child support, and protective limitations on visitation rights. Decisions in these areas may not only affect the victim and family's present well-being but may also set precedents for subsequent protection order hearings or other domestic relations proceedings. For example, without an attorney a victim might request less support than the family is legally entitled to receive, and the resulting award might influence a subsequent support award in a divorce proceeding.[1] Moreover, state child support guidelines are typically too complicated for the average lay person to understand. Further difficulties for victims in advocating effectively for their own rights may also stem from the climate of emotional crisis or fear that usually precipitates seeking a protection order. Since most victims are not schooled either in the applicable law or in legal advocacy, skilled legal assistance may be crucial in obtaining adequate protection.

An attorney for the petitioner is especially important when the respondent appears with counsel. This is most likely to occur during a violation hearing, at which defendants with sufficient means have a strong incentive to hire an attorney and indigent defendants will be provided with a public defender if serving time in jail is a possible sentence. However, in Springfield, where legal counsel is not generally available to many victims, defendants frequently also come to petition hearings with attorneys, forcing the victim to counter the defense attorney's rebuttals alone. In other cities, where representation of the petitioner is more common, having an attorney present has proven essential in preventing such imbalances. In one case observed, for example, a defense attorney argued that the petitioner was precluded from raising allegations of abuse that were not indicated on the emergency affidavit; the victim's attorney successfully argued for admission of the new allegations on the grounds that the forms are filled out in the corridor in a crisis atmosphere and are therefore often incomplete. In another case, the lawyer for a respondent sought to have a protection order vacated on the grounds that the victim did not remember the correct date when her husband allegedly battered her. The victim's attorney was able to have the order continued by arguing that the victim had met the statutory burden of proof by demonstrating, by a preponderance of the evidence, that the battery had occurred – regardless of the exact date.

Most judges in our survey also reported that evidence is generally presented more appropriately and efficiently when the petitioner is represented by counsel, rather than proceeding pro se. Many judges stated they prefer not to have to personally question petitioners in order to obtain enough information to decide whether to issue an order or what provisions to include. Several expressed concerns that such questioning might be interpreted as implying bias or might appear to violate fair procedure, although they recognized the questioning was necessary in cases in which the petitioner was without counsel.

Judges also noted that, when both parties are represented by counsel, the opposing attorneys frequently can agree to the

Figure 4 *
Statutory Provisions by State for Filing a Protection Order

Filing Provisions[1]	Alabama	Alaska	Arizona	California	Colorado	Connecticut	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska
Filing fee[2]		✓	✓			✓	✓	✓			✓	✓	✓							✓	✓		✓	✓	a
Filing fee waived for indigents[3]		✓	✓			✓	✓	✓			✓	✓	✓			✓		✓		✓	✓		✓	✓	✓
Special forms[4]		✓	✓	✓		✓	✓	✓	✓	✓	✓			✓	✓	✓	✓		✓		✓		✓	✓	
Assistance available for forms		✓	✓	✓			✓	✓	✓		✓					✓	✓		✓		✓		✓	✓	
Victim may file pro se		✓	✓			✓	✓	✓		✓	✓					✓	✓		✓		✓		✓		

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.
2. Explicitly provided in the protection order statute.
3. Explicitly provided in the protection order statute. However, some states have fee waiver provisions elsewhere in the state codes that apply to protection order proceedings but are not specifically referred to in the protection order statute.
4. Explicitly provided in the protection order statute. Local jurisdictions often provide assistance with forms even when not required by statute to do so.

a. In Nevada, all costs and fees are deferred until after a full hearing is held; costs and fees may then be assessed against either party, apportioned between the parties, or waived.

Figure 4 * (continued)
Statutory Provisions by State for Filing a Protection Order

Filing Provisions[1]	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming	Dist. of Columbia	Total Number of States
Filing fee[2]				✓			✓				✓		✓		✓	✓	✓			✓	✓	✓	✓		23
Filing fee waived for indigents[3]				✓			✓				✓		✓		✓	✓	✓			✓	✓	✓	✓		26
Special forms[4]	✓	✓	✓	✓	✓				✓	✓	✓	✓	✓		✓		✓	✓		✓	✓	✓	✓	✓	35
Assistance available for forms	✓		✓	✓					✓	✓	✓	✓			✓		✓	✓		✓	✓	✓	✓	✓	28
Victim may file pro se	✓	✓	✓	✓	✓			✓		✓	✓	✓	✓		✓	✓	✓	✓		✓		✓	✓	✓	30

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.
2. Explicitly provided in the protection order statute.
3. Explicitly provided in the protection order statute. However, some states have fee waiver provisions elsewhere in the state codes that apply to protection order proceedings but are not specifically referred to in the protection order statute.
4. Explicitly provided in the protection order statute. Local jurisdictions often provide assistance with forms even when not required by statute to do so.

provisions of a protection order before the hearing. In Philadelphia, attorneys at Women Against Abuse, a woman's legal aid organization and shelter, also favor this approach. As a result, the overwhelming majority of cases in Philadelphia are resolved through a negotiated agreement between the attorneys that the judge incorporates into the protection order. Nearly all of these agreements require the batterer to vacate the home and discontinue his abuse. Cases are often resolved in this fashion in Nashville, as well.[2]

Approaches to providing counsel

While most protection order statutes do not explicitly address the issue of availability of counsel, a few do. Nebraska's statute requires the Department of Public Welfare to provide "emergency legal counseling and referral." Wyoming's statute provides that "The court may appoint an attorney to assist and advise the petitioner."

Even where not explicitly mandated or authorized by statute, judges can play a key role in promoting access to counsel for the victim. While not so required by law, almost every victim who petitions for a protection order in Philadelphia is represented by an attorney, because the judge who handles civil protection order hearings has made it court policy to strongly encourage attorney representation in these cases. While few victims are able to hire private attorneys, most use one of the city's 1,000 attorneys who serve on a pro bono basis or one of the small number of attorneys who work for local legal aid or battered women's assistance groups. One of Boston's largest law firms has on its own trained seventeen of its lawyers to represent at no cost victims who are referred by Greater Boston Legal Services.

Judges can encourage local legal aid organizations to place a high priority on serving victims who petition for protection orders. Although legal service agencies are mandated to assist anyone who meets their eligibility criteria, resources are limited and each office establishes its own priorities. Even apparently neutral policies – such as considering the income of both spouses in determining whether a potential client is eligible financially to receive legal services – can act to deny services to a petitioner who has no realistic access to the financial resources of the abusing spouse. Judges can be influential in confronting problems such as these and encouraging legal service programs to make assisting domestic violence victims a high priority.

Bar association and pro bono service projects are another potential source for referral attorneys. The bar association in Nashville and a local association of female attorneys both decided that these cases should receive special attention as part of their pro bono contributions to the community. As illustrated in the letter solicitation in Figure 5, Women Against Abuse in Philadelphia regularly solicits practicing attorneys to represent low-income petitioners.

Working in concert with a comprehensive victim advocacy system, Duluth attorneys represent about ten percent of petitioners, usually those referred to them because of complex legal issues involved in their cases. Similarly, shelter staff advocates in Portland, Maine, call the local legal aid society to help petitioners in cases involving non-traditional families or contested credibility issues.

Agencies and offices associated with the criminal justice system can also serve as resources in many communities. In Ithaca, New York, the Assigned Counsel Office in Family Court tries to find an attorney for every indigent petitioner. These private attorneys are paid a reduced fee by the county. Most assignments are made on an emergency basis while the victim is in court. With this system of assigning attorneys, very few domestic violence victims file pro se, although a few elect to do so voluntarily.

In Chicago and Springfield, most victims who petition for an order are represented by a prosecutor, pursuant to the statutory mandate that victims may request "through the respective State's Attorney, an order of protection in a criminal proceeding during pre-trial release of a defendant or as a condition of probation, conditional discharge or supervision." These cities provide free legal counsel and expedited service in seeking a protection order if the victim files a criminal complaint at the same time she petitions for a protection order, and the prosecutor typically handles both aspects simultaneously.[3]

While the assistance of Illinois prosecutors is pursuant to a specific provision in the protection order statute, prosecutor's offices in other states may provide services as a part of a larger mandate to control crime. In some Massachusetts courts, for example, prosecutors routinely assist protection order petitioners but exercise prosecutorial discretion as to whether or not to also seek criminal prosecution. Since protection orders offer an opportunity to prevent future crime and enhance law enforcement, regular involvement by prosecutors, while creating an immediate time demand, may be viewed as a desirable investment in reducing future caseloads.[4]

Judges may be able to arrange for second or third year law school students to represent victims. In structured programs with adequate training and supervision, this could provide a viable alternative to requiring petitioners to proceed pro se. For example, in many states law school deans send to the State Supreme Court the names of students who wish to work for legal services organizations as part of a clinical program. Upon representation by the deans that the students are in good standing and have taken applicable courses (e.g., evidence), the court certifies the students to appear in court as attorneys. As part of this program, students at Georgetown, Hastings, Harvard, West Virginia, and other law schools represent victims of domestic violence who might otherwise go unrepresented.

Figure 5

Call for Pro Bono Assistance

WOMEN AGAINST ABUSE

HOTLINE
386-7777

SHELTER
P.O. Box 12233
Philadelphia, PA 19144
386-1280

LEGAL CENTER
Room 503
City Hall Annex
Philadelphia, PA 19107
686-7082, 7086

VOLUNTEER ATTORNEY PROJECT

Women Against Abuse's Volunteer Attorney Project, developed in cooperation with the Philadelphia Bar Association Young Lawyer's Section and the Women's Rights Committee in 1984, seeks practicing attorneys to represent low income victims of domestic violence on a pro bono basis in Protection from Abuse Act cases. The Women Against Abuse Legal Center conducts trainings twice yearly for new volunteer attorneys. A manual on handling Protection From Abuse Act cases is provided to all participating attorneys.

The Legal Center screens and interviews the clients referred to Volunteer Attorneys and provides the attorneys with information on the clients' cases. This is an excellent opportunity to provide invaluable service to victims of domestic violence and to expand your knowledge of this area of family law. For more information contact , Volunteer Attorney Project Coordinator at MU-6-7082.

Limitations to availability of counsel

Even with strenuous efforts by the court and community to provide legal counsel for petitioners, victims in some jurisdictions may have to rely on lay assistance. Few jurisdictions have allocated funds for paid legal counsel for all indigent petitioners, and many communities cannot recruit enough attorneys willing to provide assistance without charge. Thus, the Legal Aid Society in Springfield, swamped with requests for help, can take on only the most serious cases. Even in Philadelphia, overburdened attorneys at Women Against Abuse have to put most victims on a waiting list.

Furthermore, many domestic violence victims who do not have enough money to afford a private attorney are also not poor enough to qualify for free legal services— especially when a financially dominant spouse's income is included in the determination of indigency status. While in Nashville and some other jurisdictions the court can order the offender to pay the victim's legal fees, lawyers are understandably reluctant to take on such cases because it may require a law suit to force the offender to pay.

Pro Se Petitioning

Pro se petitioning, particularly in cases in which legal counsel is not generally available to lower and middle-income victims, is an important component in guaranteeing access to protection. As victim advocates have noted, one advantage of civil protection orders should be that victims *can* secure them on their own. Being able to proceed pro se is seen as a way of opening the court system to the poor, who cannot usually gain ready access to the legal system.

Many civil protection order statutes specifically authorize and facilitate pro se petitions. (See Figure 4.) For example, Florida provides that a cause of action for an injunction "shall not require that the petitioner be represented by an attorney." Illinois law requires that

> The court shall provide, through the office of the clerk of the court, simplified forms and clerical assistance to help with the writing and filing of a petition under this Section by any person not represented by counsel.

The majority of victims in many jurisdictions do petition on their own. For example, during a three month period in 1987, 49 out of 61 petitioners in Nashville — 80 percent — appeared at the hearing for a permanent order without an attorney. Of the other sites we studied, few victims are represented by counsel in Duluth, Colorado Springs, Seattle, and Portland, Maine, and Portland, Oregon.

In cases in which the petitioner is without legal representation (whether due to unavailability of counsel or, in the less common case, in the exercise of a legal right to self-representation), it is often more difficult for the court to adequately assess the need of the victim and any children for protection. However, judges in several jurisdictions respond by taking a few basic steps to learn what assistance is needed; for example, they ask questions regarding child support, alternative living arrangements, the need for shared property like a car, the need for a no-contact stipulation at places other than the residence (e.g., place of employment, local business establishments), and possible danger to children. Some judges are careful to advise the victim at the ex parte hearing to return to the full hearing, bringing any available witnesses or other evidence. These judges also showed an impressive degree of consideration toward lay advocates, who often were not fully familiar with the rules of court procedure.

In the absence of an attorney, the likelihood that victims who proceed pro se will receive adequate protection is increased not only by the conscientiousness of judges, but also if there is competent and experienced lay assistance available. Lay help usually comes from two sources: victim advocates (who can provide a variety of practical services, as well as facilitate the petitioning process) and court clerks (who can facilitate the petitioning process).

Victim advocates

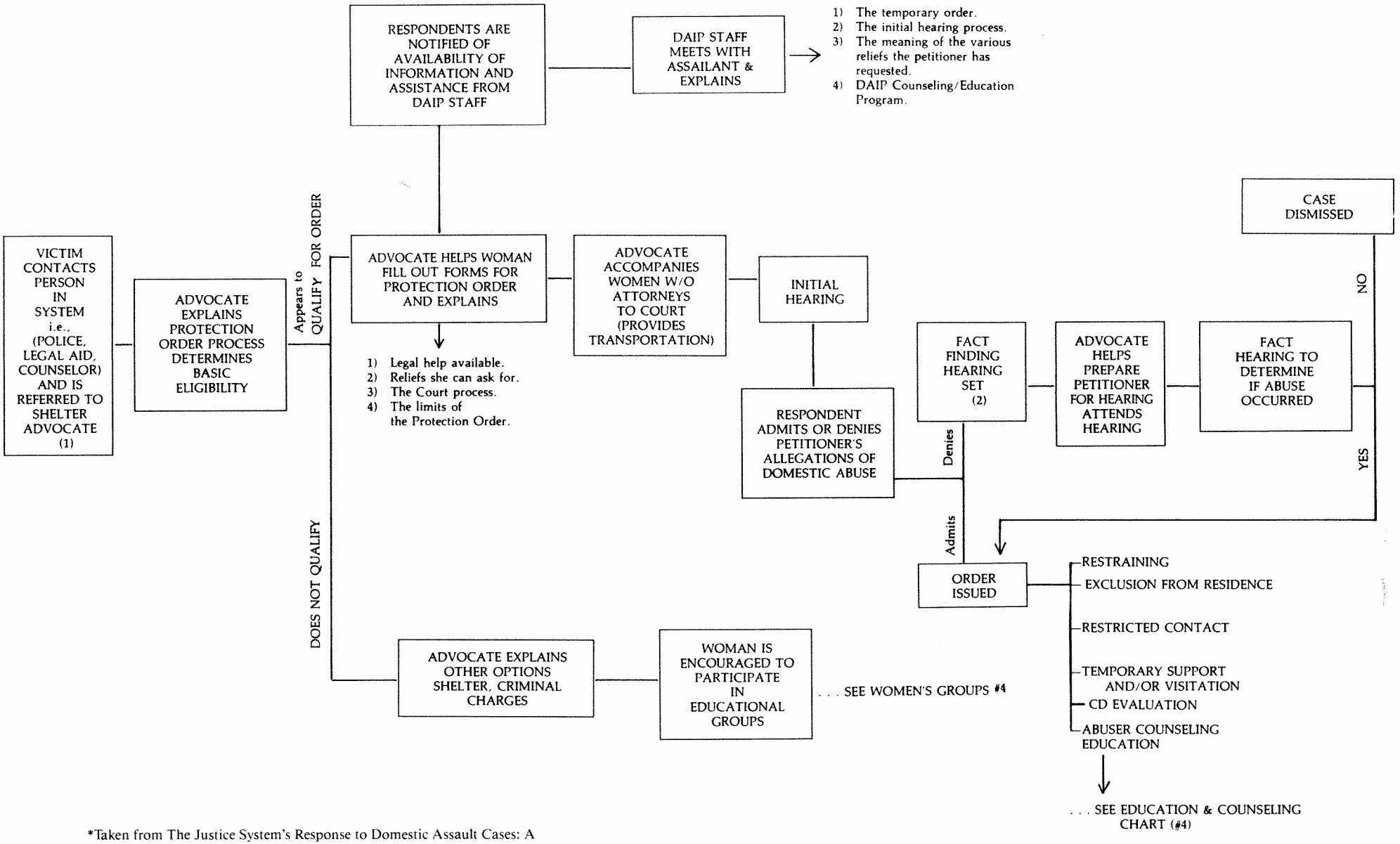
Some state statutes specifically provide for the use of victim advocates to assist victims in filing for a protection order. Hawaii's statute expressly requires that "The family court shall designate an employee or appropriate non-judicial agency to assist the person in completing the petition." Georgia provides that

> Family violence shelter or social service agency staff members designated by the court may explain to all victims not represented by counsel the procedures for filling out and filing all forms and pleadings necessary for the presentation of their petition to the court.

In Duluth, Springfield, and several other jurisdictions, lay advocates provide assistance to victims that extends way beyond helping them to fill out the petition forms. Figure 6 is a flow chart that indicates the comprehensive assistance advocates provide in Duluth. For each victim, an advocate:

- determines the victim's eligibility under the statute to petition for an order and explains the protection order process;
- assists in filling out the forms;
- explains the legal help available to the victim, the relief she can ask for, and the limitations of an order;
- joins the petitioner at the initial hearing for a temporary order;
- helps prepare the victim for the hearing for the full order; and
- attends the full hearing with the victim.

Figure 6
Petitioning Process in Duluth Indicating Role of Victim Advocate
CIVIL COURT & ADVOCACY RESPONSE



*Taken from The Justice System's Response to Domestic Assault Cases: A Guide for Policy Development, by Ellen Pence (Minnesota Program Development, Inc., Duluth: 1985). Reprinted by permission.

1. Male victims are referred to DAIP.
2. Fact hearings are scheduled immediately or at a future date

In Seattle, a Domestic Violence Coordinator stationed in the clerk's office provides victims with a packet containing petitioning information, forms, and a list of resources, along with access to a videotape[5] on the petitioning process that was developed by the state bar association.

Even in Springfield and Chicago, where prosecutors represent most petitioners, victim advocates affiliated with the prosecutor's office perform an indispensable function in helping victims to prepare the petitions, and providing emotional encouragement as needed, because the state's attorneys do not have time to provide these services. A similar service is provided in many Massachusetts courts, where a victim/witness program, affiliated with the prosecutor's office, supplements the prosecutor's efforts. Victim/witness advocates in Massachusetts are not limited to spouse abuse cases, but can assist in any case in which a potential state's witness requires personal attention due to, for example, the personal nature of the trauma experienced (e.g., rape, or the murder of a family member) or the age of the victim (e.g., crimes against children).

In many respects, a combination of legal representation and lay advocacy provides victims with the maximum protection and best enhances the court process, because victim advocates can often assist petitioners in ways that most attorneys cannot. Advocates may have a better understanding of the emotional and social impact of domestic violence and a greater ability to communicate with victims than most attorneys. They may also have more familiarity with the practical impact of common provisions in protection orders than attorneys who handle only one or two cases a year. For example, an advocate in Portland, Maine, spent several minutes explaining to a victim the importance of requesting limitations on her partner's visitation rights because of the potential for renewed violence when the man would come to pick up or drop off their children. In another jurisdiction, an advocate was observed addressing a problem common to many victims — feelings of guilt when children plead with their mother "not to kick daddy out of the house."

Several judges reported that most advocates expedite court proceedings in numerous ways:

- By pre-screening petitioners for to make sure they meet the eligibility criteria under the statute, and making sure that petition forms are properly completed before the hearing;
- By accompanying distraught or intimidated victims in the courtroom, resulting in more orderly proceedings;
- By arranging to have witnesses appear with the victim, thus facilitating the orderly and complete presentation of evidence;
- By addressing petitioners' fears about appearing for the permanent hearing, or unfamiliarity with their duty to attend, thus avoiding possible miscarriage of justice or inconvenience to the court;
- By increasing the court's ability in some cases to provide needed protection; and
- By helping to identify cases in which attorney assistance is essential.

Because of these advantages to advocate involvement, judges in Duluth encourage advocates to provide information to the court to supplement information the petitioner provides. These judges generally do not find the advocates' lay status to be a significant handicap. To improve case handling and agency responsiveness, the Duluth judges have provided training for advocates and meet quarterly with the victim advocacy group to address mutual problems and preview changes in court procedures.

Victim advocates do have limitations, however. Because they are not attorneys, they must be careful not to engage in the practice of law. In many jurisdictions, judges will permit advocates to sit in on the hearings but not allow them to participate. Even where advocates can participate fully in the courtroom, their effectiveness is often limited when the respondent appears with an attorney.

Court clerks

When victim advocates and attorneys are not available, assistance from court clerks is an essential last resort. In recognition of this need, several states require clerks to assist petitioners. For example, New Hampshire's statute makes it "the responsibility of the clerk of the court to advise victims that they may request that the judge issue an order" that excludes the batterer from the household and provides the victim with child custody, child and spouse support, and financial reparations. Nevada's statute provides that "The clerk of court or other person designated by the court shall assist any party in completing and filing the application . . . ." Missouri requires that "Notice of the fact that clerks will provide such assistance shall be conspicuously posted in the clerks' offices."

In a few of the study sites, clerks play an extremely valuable role in assisting petitioners. They provide explicit instructions regarding the level of detail the petitioner must use in describing the abuse in the petition and make sure the victims request all the protections to which they may be entitled. However, clerks in most jurisdictions we visited — and, reportedly, in many other parts of the country — are very cautious about providing help. In part, this hesitation reflects lack of time to undertake this new responsibility. But clerks are also concerned that they will be accused of unauthorized

practice of the law. While some clerks may overreact to this threat and provide much less help than they are legally allowed to furnish, there are often good reasons for concern. Nevada's statute expressly warns that "the clerk shall not render any advice or service that requires the professional judgment of an attorney." A sign in the clerk's office in Springfield informs petitioners that "By Law, Employees Are Not Permitted to Give Legal Advice." Clerks in Nashville provide virtually no help because they have been warned that they could be sued. The defense bar has registered complaints about clerk assistance in Chicago and in Portland, Oregon.

It is difficult to generalize regarding what clerks may or may not do because the legal definition of practice of law varies from one jurisdiction to another. However, in *Minnesota v. Errington*, 310 N.W. 2d 681 (Minn. 1981), the Supreme Court of Minnesota upheld a provision in the state's civil protection order statute that requires clerks of court to assist victims in filling out protection order petition forms. The court rejected a challenge which claimed that the provision (a) involved personnel of the clerk of court's office in unauthorized practice of law and (b) created the appearance that court personnel, by aiding petitioners, were biased in their favor. The court ruled that "the ministerial functions in question do not constitute the practice of law any more than the giving of a *Miranda* warning by a police officer to a defendant constitutes the practice of law."

Regardless of the law, clerks do at times exert substantial unsupervised influence in screening petitioners for eligibility and encouraging or discouraging them from seeking an order. In one jurisdiction, clerks mistakenly told each prospective petitioner that she was not eligible for a protection order if she had not lived with the batterer within the past year — when, in fact, the statute had been amended to permit orders when the parties had lived together any time during the previous two years. In another site, a judge reported that only three or four protection orders are filed each year in a neighboring jurisdiction because the clerks erroneously tell every woman seeking a protection order that she must first file for divorce.

Some clerks may act out prejudices against victims of domestic violence — for example, by discouraging victims who return several times for an order. Others may act as unauthorized victim advocates; one clerk, for example, tries to persuade victims who want to have their order vacated to have it modified, instead.

This report cannot examine the issue of unauthorized practice of law. However, it is clear that judges can significantly improve the assistance that clerks provide petitioners by ensuring that clerks are given written instructions for assessing petitioners' eligibility for a protection order under the state statute — and firm instructions that they are not to assess the petitioner's credibility, advise her what course of action to follow, or give legal advice. The goal is to limit the role of clerks to (a) screening for statutory eligibility and (b) providing appropriate assistance in filling out the petition — in a helpful, thorough, and welcoming manner. To ensure proper case handling by clerks, Milwaukee and San Francisco hold training seminars for them. In Seattle, the Supervisor of the Family Court brings two or three clerks together periodically to discuss how to handle unusual cases.

With proper training, clerks can save judges time by ensuring that only legally qualified petitioners come to the hearing, that all the forms have been properly completed, and that petitioners are not unduly intimidated by the judicial process. However, judges experienced in effective administration note that clerks need to be given adequate time to fulfill their responsibilities, regularly monitored, and rotated to prevent burnout.

Petitioner Appearance at the Ex Parte Hearing

While most protection order statutes specify that an ex parte hearing shall precede the issuance of any emergency order, none explicitly state that the petitioner must personally be present at that hearing. The Washington statute requires that "[t]he court shall hold an ex parte hearing in person or by telephone on the day the petition is filed or on the following judicial day," but it is unclear whether "in person or by telephone" refers to the judge or the petitioner.

In Colorado, state statute permits police officers to telephone a judge for an emergency order from the victim's home whenever the courthouse is closed; the officers then serve the order on the batterer on the spot. California provides for a similar procedure under a recent amendment to its code of civil procedure. This procedure has the obvious advantages of providing immediate relief for the victim and avoiding any delay of service.

Our study revealed that, at least in Colorado Springs and Portland, Oregon, many judges do not usually see the petitioner in person before issuing an ex parte order. In Portland, the judge who issues civil protection orders reports he does not have time to talk to each of the 20-25 victims who file each day, although he would like to hold hearings for each petitioner.

Some judges believe that not seeing the petitioner is beneficial, because victims who are intimidated by the prospect of a hearing may decide not to petition for an order, especially if they will not be accompanied by an attorney or advocate. Not requiring a hearing also has the advantage of making the filing process very quick. Petitioners in Portland, Oregon, for example, can usually secure an order in under an hour. By contrast, in Springfield, where judges do talk with each petitioner, by noontime there may be a backlog of several

petitioners who have been waiting in court since early morning.

Most judges we interviewed, however, felt that there were several compelling reasons for talking with the victim, however briefly, before granting an order.

- To determine by questioning the petitioner what dangers may exist and what provisions in the order are necessary to ensure safety;
- To inform the petitioner of the importance of appearing for the hearing on a permanent order; and
- To assess the petitioner's credibility and thus safeguard the due process rights of the defendant.

Judges also pointed out that only by viewing the victim can they accurately assess the nature of any visible injuries she may have received. Recording this information on the petition becomes important for use in the subsequent hearing for a permanent order since by that time the "evidence" may have healed. The petition form should have a designated space for recording this information.

Finally, only by talking with the victim can judges explain what will and will not happen to the offender if he violates the order. Victims often have the mistaken impression that any violation will always result in an immediate arrest of the offender. This illusion leaves the victim with a dangerously false sense of security. The arrest powers law enforcement officers actually have when an order has been violated are discussed in Chapter 5 under "Arresting Violators."

Although it is best to talk with each petitioner, judges who are unable to do so have found ways to partially overcome this limitation. For example, while some judges in Colorado Springs were said to automatically approve after-hour telephone requests for petitions, others ask probing questions which the on-scene police officer, trained to observe the details of the crime scene and the victim's physical condition, can answer with considerable accuracy. The judge in Portland, Oregon, makes sure that his clerks include detailed information about the incident in every petition and flag dubious cases for special attention (another reason to provide adequate training for clerks).

Withdrawals of Orders

Many judges are frustrated when petitioners who are granted a temporary order fail to appear at the hearing for a permanent order, or come into court to ask to have the temporary order vacated. Judges are also understandably concerned when defendants appear in court alone and say that their partner asked them to show up to have the order vacated.

While it is impossible to know all the reasons why the petitioner might not appear or might ask for the order to be vacated, there is considerable anecdotal evidence that in many cases the defendant has threatened to assault the victim if she returns for the full hearing and requests a permanent order. In one case, a batterer took all his partner's clothes on the morning of the hearing so she could not attend. In cases where there is no victim advocate and the court date was announced quickly and in legal language, some victims do not realize they need to return for a full hearing. The offender, however, who has had legal papers served on him, is well aware of the hearing date.

The Intrafamily Rules of the Superior Court of Washington, D.C., expressly note that "In allowing dismissal, the Court may wish to inquire carefully about the voluntariness of the petitioner's actions and advise the petitioner of the right to refile the petition if all other statutory requirements are met." Judges in some jurisdictions also make a regular effort to determine whether petitioners who fail to appear understood the nature of the hearing and have not been intimidated. In some jurisdictions, judges ask a defendant who appears in the petitioner's absence to wait, and then direct a victim advocate to telephone the victim. (This procedure did not appear to be common when neither party appeared, although it would seem that the dangers would be equally great.) Other judges will vacate the order, which usually is about to expire in any case, but without prejudice to the petitioner if she returns in the future for another temporary order.

Judges in Duluth and many other jurisdictions maintain protection orders in force against the express wishes of the victim. One judge in Chicago refuses to vacate an order when a child has also been beaten by the respondent. Only the Alaska statute requires that "If at the hearing the petitioner does not proceed with the petition for injunctive relief, the court shall dissolve the emergency injunctive relief order."

Repeat Petitioners

Occasionally, victims return several times to petition for an order of protection, either after failing to appear at the hearing for a permanent order or after withdrawing previous petitions. This is understandably frustrating to judges, and some express concern that repeat petitioners may be abusing the system to remove their partner temporarily from the home without any real intention of ending domestic violence. As a result, if the need for an ex parte order does not appear compelling, judges may schedule the parties for a hearing on a full order without issuing a temporary order. A judge in Portland, Maine, who often follows this procedure in repeat cases, is nonetheless careful to advise petitioners that they can return before the scheduled hearing if there are new episodes of violence.

While repeat petitioners can be frustrating, a judge in Chicago finds that there usually are good reasons for the victim's

return. Sometimes the victim withdrew the earlier petition because she was convinced her partner would reform or because he promised to enter counseling. "I respect their right to drop the charges as the best thing for them," emphasized that judge. "Circumstances change. What appeared to be working three months ago isn't now."

This viewpoint is supported by an understanding of the cyclical nature of domestic violence. Most abusers are not physically violent on an everyday basis; often, incidents of abuse are followed by a period of affectionate behavior and promises – or even attempts – to reform. Some victims trust these attempts at reform enough to withdraw or not proceed with protection order petitions. If later, however, the violence is resumed, a new petition and order may be essential.

Another judge noted that, just as most cigarette smokers attempt to quit many times before they finally succeed for good, many victims of abuse make several unsuccessful attempts to try to stop the battering by themselves – or to leave the situation – before they are emotionally and economically able to seek legal protection. Recognizing this type of situation, a protection order judge in Philadelphia granted a woman's request to vacate her permanent order because her alcoholic husband was improving with treatment, but reminded the victim that "[Y]ou can always come back if you need to – the door is open to you. Do you understand that?"

At other times, the victim is physically unable to appear for the hearing for a permanent order, does not understand that a second hearing is required, or is intimidated by threats of greater violence from the offender if she persists in the court action.

In the opinion of some judges, the wisest course of action is to grant the emergency order if it appears warranted on its face and to address the issue of repeat petitioning at the hearing on the permanent order, attempting to determine the exact nature of the problem and how to best protect the victim from further abuse. The Colorado statute reflects this approach by requiring that

> If three emergency protection orders are issued within a one-year period involving the same parties . . ., the court shall summon the parties to appear before the court at a hearing to review the circumstances giving rise to such emergency protection orders.

Weekend and Evening Emergencies

Many – perhaps most – victims of domestic violence are threatened or attacked during evenings and weekends, when courts are ordinarily closed. For this reason, statutes in 23 states (see Figure 3 in Chapter 2) provide for emergency civil protection orders after court hours (although any court on its own authority may make after-hours emergency relief available). For example, the Illinois statute provides the following:

> Emergency Relief. (a) When the court is unavailable at the close of business, the petitioner may file a petition before any available circuit judge or associate judge who may grant relief in accordance with Section 208 of this Act [dealing with types of relief available] if the judge deems it necessary to protect the petitioner or minor children from abuse, upon good cause shown in an ex parte proceeding. Immediate and present danger of abuse to the petitioner or minor children shall constitute good cause for purposes of this Section. (b) Any order issued under subsection (a) shall expire at the close of business of the court on the third following day the court is open; during which time, the petitioner may seek an order of protection.

Despite this authority, most jurisdictions in Illinois have not established a system for victims to secure emergency relief. As a result, a shelter advocate in Springfield once had to awaken a judge at 3:00 a.m. at his home; the judge came outside in his bathrobe and signed the emergency order. Illinois is not alone in providing coverage in theory but not in fact; most of the other study sites have statutory authorization to provide emergency relief, but only Philadelphia and Colorado Springs had established formal procedures for issuing emergency orders.

Philadelphia

The Pennsylvania statute provides for emergency relief, but only from the close of business on Friday until Monday morning by authorizing municipal court judges to accept petitions. A Philadelphia city ordinance extends availability by providing for emergency relief from 5:00 p.m. to 9:00 a.m. on weekdays. The city empowers municipal court bail commissioners, who hear after-hour arraignments, to act on petitions for emergency relief in the name of the administrative judge of the Philadelphia Family Court Division. Until recently, the emergency order expired when court reopened, at which time the victim might seek a temporary protection order from the Court of Common Pleas. Under statutory change, emergency orders will be certified to last until the hearing date.

The after-hours bail commissioners are located at police headquarters in downtown Philadelphia. At the stationhouse, the victim is interviewed by a volunteer from Women Against Abuse, a local non-profit legal center, or by an assistant district attorney on duty. If the victim is statutorily eligible, she is assisted in preparing the petition. A bail commissioner reviews the petition without seeing the victim and signs an emergency order. The order may require the batterer to vacate the home as well as enjoin any further abuse. A copy of the signed order is transmitted immediately to the police

communications center in the same building. The victim must then inform police at the local station nearest her home that she has a protection order to serve. A police officer is required to accompany her to serve the order and wait until the defendant leaves the residence.

Although several victims per week obtain emergency orders in this manner, it is difficult for many to find affordable transportation downtown at night and on weekends. Transportation is further complicated for a victim with children; she must either take her children with her or find a babysitter on short notice. In addition, victims must appear in court at the beginning of the next business day in order to continue the protection. The burdens of this process may prohibit some victims from obtaining protection when they need it most.

Colorado Springs

According to Colorado statute, "The chief judge in each judicial district shall be responsible for making available in each judicial district a judge to issue by telephone emergency protection orders at all times when the county and district courts are otherwise closed for judicial business. Such judge may be a district or county judge or a special associate, an associate, or an assistant county judge."

Once a police officer called to the scene has determined that an emergency protection order is appropriate, the officer telephones the on-call judge and explains the situation. If the judge issues the order, the officer fills out a blank copy of a protection order and serves it on the defendant. The officer tells the offender to leave the premises, and warns that if he returns he will be arrested and held overnight without bond, allows the offender to collect some personal belongings, then waits until he has left.

Emergency orders remain in effect until the *close* of judicial business on the next day the court is open. Allowing a battered woman a full court day to seek extended relief alleviates the gap in coverage caused by emergency orders that expire at the opening of the next judicial day (as previously in Philadelphia). Another advantage of the Colorado system is that petitioners do not have to leave their homes to get emergency protection. However, it is important that emergency protection orders not be issued as an alternative to arrest in situations in which arrest is the appropriate response.

Indeed, several of the police officers we interviewed said they are very selective in deciding which cases are serious enough to warrant the immediate attention of an on-call judge. For example, although the statute makes the threat of domestic violence grounds for issuing an emergency order, some officers report they will not call a judge unless they believe there has been actual violence. Some officers are concerned about their liability in physically issuing a court order, even though authorization has come from a judge. Others seem unsure about their authority to "bother" a judge late at night. However, officers who have used the system reported that judges rarely turned down their requests for emergency orders except in situations concerning divorced or legally separated partners (although there seems to be no statutory basis for such a rejection).

Centralized Court Administration

Some jurisdictions have centralized all civil protection order procedures in one courtroom. In Philadelphia, one judge from the Court of Common Pleas handles all protection orders — including any violation hearings. Before this arrangement was established, protection order hearings were assigned randomly to 15 to 20 family court judges in the Court of Common Pleas. As a result, hearings were constantly being postponed because the one or two legal services agency attorneys who represent most petitioners were involved in cases that were listed for simultaneous hearings in as many as ten different courtrooms. The centralized court enables these attorneys to consolidate their services in one courtroom, while also allowing the judge who hears the cases to develop specialized expertise in the protection order statute and the nature of domestic violence.

Centralization in Philadelphia also made obtaining and enforcing orders much easier for victims. Petitioners now have to go to only one courtroom and attend one hearing to have both their petition reviewed and the misdemeanor criminal charge heard. They also return to the same court and judge for permanent order and violation hearings. An unexpected benefit for petitioners has been the opportunity to share problems and gain mutual support while congregating in a single waiting room until their case is heard.

Nashville has a similar centralized arrangement. One of five circuit court family judges conducts all hearings on protection orders, including petitions and violation hearings. In Portland, Oregon, a single judge handles all petitions for emergency orders — but when a respondent asks for a hearing, a different judge handles the proceeding. All emergency order hearings were assigned to one judge because there had been lack of uniformity in court decisions when several different judges were reviewing petitions.

The Illinois Domestic Violence Act authorizes a victim to petition for an order in criminal court if she files criminal charges at the same time. This procedural consolidation of civil and criminal cases in Chicago has been accompanied by physical consolidation in only two criminal courtrooms in the Cook County Court Building. The woman meets first with a warrant officer, who completes a criminal report for use by the judge. The warrant officer then directs the petitioner to the court clerk for docketing, and then to one of two

courtrooms depending on where the parties reside. While the petitioner waits, staff from the victim assistance program spend 30-45 minutes assisting her in completing the petition. The petitioner meets briefly with a state's attorney to review the incident and then appears together with the prosecutor and petitioner before the judge. If the petition is found to be credible, the judge will issue an ex parte protection order and set a date for the hearing on both the criminal charge and the issuance of a full protection order. Subsequent violations are also heard by the same judge.

As in Philadelphia, physical centralization in two courtrooms was arranged in Chicago largely because the victim advocates found they could not assist victims effectively when cases could be heard in any of the seventeen courtrooms in the Family Court building. Court administrators agreed to the consolidation in part because by helping victims to fill out their petitions, advocates save the prosecutors considerable time.

Cases in Chicago are assigned to only four out of forty assistant state's attorneys. This enables these prosecutors to become experts in civil protection orders and domestic violence. It also limits the number of prosecutors the victim advocates have to locate and work with in the multi-story courthouse.

The consolidation of criminal and civil proceedings in one hearing in Chicago and Philadelphia, and their physical centralization in one or two courtrooms, expedite the proceedings and reduce the workload for everyone involved. By reducing inconvenience and confusion for victims, they also may increase the chances that women will see the petition through and report violations.

However, centralizing protection order cases with one or two judges can also be risky, particularly if that is their only assignment. Domestic violence cases are typically considered a low status assignment yet at the same time can be exhausting to hear. As a result, some judges who devote full time to hearing protection order petitions and violations may find they are unable to give the careful attention these cases require.

Endnotes

1. Lisa Lerman. A Model State Act: Remedies for Domestic Abuse. *Harvard Journal on Legislation*, 1984, *21* (1), p.87.

2. A distinction needs to be made between a negotiated settlement involving attorneys, and mediation with a neutral third party trying to represent both sides (sometimes called alternative dispute resolution). Victims are poorly served by the latter, because they are typically emotionally and economically at a severe disadvantage compared to the batterer. Additionally, this type of mediation implies mutual responsibility for a "family problem," rather than individual responsibility for violent conduct which is in fact criminal behavior. However, once an emergency protection order has been issued, attorney-assisted negotiation between the victim and the offender can be helpful to work out the complex details of such matters as visitation, necessary exchange of personal goods, and other provisions to be included in the permanent order. For example, the District of Columbia uses Domestic Mediators, who are trained lawyers and mental health professionals, to "mediate" issues of visitation, child support, and property after a protection order has been issued. This service reduces considerably the time the court must spend on these issues and helps ensure they are given proper attention.

3. The Texas Protective Orders statute permits "any prosecutor who serves the county in which the application is to be filed" to file an application for an order. However, if the application is filed by a prosecuting attorney the court may "assess a reasonable attorney's fee as compensation for the services of the prosecuting attorney. . . .[considering] the income and ability to pay of the person against whom the fee is assessed."

4. The practice of involving prosecutor's offices in civil or quasi-criminal matters which could otherwise escalate into more serious criminal matters is not without precedent. For example, prosecutors in some states routinely handle interstate child support collection, using civil remedies (e.g., Uniform Reciprocal Enforcement of Support Act) or criminal remedies (e.g., child abandonment statutes) according to the circumstances of the case and what is most likely to be effective.

5. The videotape may be obtained for $15.00 from the Seattle-King County Bar Association, 320 Central Building, Seattle, Washington 98104.

Chapter 4: Types of Relief

Many judges emphasize that, to be effective, temporary and permanent civil protection orders must include *all* the statutorily authorized protection against further abuse that the victim needs given the particular circumstances of the case. Judges point out that in intimate relationships the victim needs a high level of protection because the batterer typically has ready access to the victim.

Judges also stress that each type of relief provided must be *fully explained* in the order. For example, if the offender might abuse the petitioner at work or school, the order should explicitly enjoin him from appearing there. Providing precise conditions of relief makes the offender aware of the specific behavior prohibited. A *high degree of specificity* also makes it easier for police officers and other judges to determine later whether the respondent has violated the order.

Figure 7 provides an example of a hypothetical order of protection. This order may prove to be inadequate because it protects the petitioner only from further abuse and contact with the batterer, and because it fails to specify the types of contact that are enjoined. Figure 8 presents an example of an order that is more likely to achieve the court's objectives. In this second hypothetical order, the judge has provided several types of relief and specified their conditions in detail.

Statutory Basis for Relief

Figure 9 presents the types of relief authorized by statute in each state. As the data show, most state statutes authorize a broad range of relief. However, the maximum relief is authorized in the 38 states that explicitly grant judges the latitude to grant *any* constitutionally defensible relief that is warranted. For example, Florida's act empowers the court to grant an injunction "[O]rdering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies. . . ." Such a provision means, for example, that the court does not need specific statutory authority to impound the victim's address (that is, keep it secret) if this measure is considered necessary to protect her safety.

In some states (e.g., Massachusetts and Vermont) all the relief authorized for inclusion in a permanent order may also be provided in an emergency ex parte order. More commonly, however, statutes exclude some types of relief from the emergency orders. For example, California, Mississippi, Missouri, Nevada, Pennsylvania, and Utah all exclude spouse support; California and Virginia exclude mandatory counseling; and Missouri excludes child support. At a minimum, however, every civil protection order statute permits eviction of the batterer in an ex parte temporary order, and most authorize awarding the victim temporary custody of the children. Furthermore, Connecticut, Maryland, Massachusetts, North Dakota, and Washington authorize the court to grant such additional relief as the court deems proper in the emergency proceeding.

Comments from judges and courtroom observation indicate that six common types of relief require special discussion: eviction of the offender, no-contact provisions, child custody, visitation, mandatory counseling, and mutual orders.

Eviction of the Offender

The ability of judges to order offenders to stay away from the family home is perhaps the key provision of protection order statutes. Without it, many victims cannot be adequately protected. Since family violence is not easily reversed and may escalate with continued access, safety concerns dictate that the offender not be permitted to continue to live with the victim. Reflecting this consideration, statutes in all 48 states and the District of Columbia provide for the eviction of the offender in both the temporary and permanent order.

However, the most difficult decision for judges is not whether to evict the offender as part of the permanent order — although this concerns judges as well — but whether to include a provision evicting the respondent from the residence in an ex parte proceeding before the offender has had a chance to state his side of the case.

Some judges believe that an ex parte eviction might violate the respondent's due process rights to proper notice and a hearing. Other judges are concerned that a man might be forced to undergo the hardship of leaving home on the basis of a fraudulent claim by a petitioner. Finally, society as a whole has been conditioned to treat "a man's" home as "his castle," making it seem unfair to force him to leave for any reason.

However, ex parte relief fits in with a long history in American civil law of issuing temporary restraining orders as a means of preventing immediate and irreparable harm by enjoining a given party from specific, imminent behavior that may occur in the interval between the time the court learns of the danger and the time a hearing can be held to adjudicate the matter in the presence of both parties. Moreover, the provision of such ex parte relief is strongly supported by both case law and statute.

Case law

The leading United States Supreme Court cases on ex parte relief, which appear controlling in protection order cases

Figure 7

Sample Inadequate Order of Protection

STATE OF MAINE

SUPERIOR COURT
_____, ss
Docket No. _____

DISTRICT COURT
Division of Southern Cook
Location Lexington
Docket No. DV-____

MARY B.

Plaintiff

vs.

HOWARD U.

Defendant

ORDER FOR PROTECTION FROM ABUSE

After due notice and full hearing on the merits of the Complaint for Protection from Abuse, pursuant to 19 M.R.S.A. §761 *et seq.*, and the following parties being present: ☐ Plaintiff ☐ Defendant,

THE COURT FINDS THAT:

The parties are family or household members; and, the Plaintiff was abused by the Defendant.

THEREFORE, it is hereby ORDERED that:

☒ (A) The Defendant is prohibited from threatening, assaulting, molesting, attacking, harassing or otherwise abusing the Plaintiff and any minor child(ren) residing in the household.

☒ (B) Defendnat is prohibited from going upon the premises of any separate residence of the Plaintiff.

☒ (C) Plaintiff is granted possession of and the Defendant is excluded forthwith and prohibited from entering the residence at 10 Street, Lexington, Maine.

☒ (D) The parties' personal property and household goods are divided as follows:
Each party shall retain their own personal property.

and the following order for protection of property are entered:

☒ (E) Plaintiff is awarded custody of the minor child(ren), whose names and ages are as follows:
SALLY (aged 7); and,
BOBBY (aged 5).
Defendants' rights of visitation are limited as follows:

To be determined later.

A VIOLATION OF ANY ABOVE ORDER IN PARAGRAPHS A THROUGH E IS A CLASS D CRIME

It is further ORDERED and DECREED:

☒ (F) The Defendant receive counselling from a social worker, family service agency, mental health center, psychiatric or other guidance service, to wit: ____

FORM 3C Rev. (1 86)
CV-22 Rev. (1/86)

☒ (G) That Defendant pay the sum of $_____ per week, per child, toward the support of said child(ren) and $_____ per week toward the support of the Plaintiff, first payment(s) due _____, 19_ _.

☒ (H) That said child support payments be payable to the Maine Department of Human Services so long as said child(ren) are receiving Aid To Families with Dependent Children.

☒ (I) That the Defendant pay to _____, the Plaintiff, the sum of $_____ forthwith, a monetary compensation for losses suffered as direct result of the abuse.

☐ (J) That _____ pay to _____ the sum of $_____ as counsel fees.

☒ (K) It is further ORDERED and DECREED: _____

_____

_____

_____

_____

A WILLFUL VIOLATION OF ANY ABOVE ORDER IN PARAGRAPHS F THROUGH K IS CONTEMPT OF COURT

These orders are effective forthwith and shall remain in full force and effect until April 19, 19 87 (up to one year) unless earlier modified or vacated by order of court.

Copies of this Order shall be furnished by the Clerk of the Lexington Police Department (law enforcement agency). It is ORDERED that a copy of this ORDER be served in hand on the Defendant by the Lexington Police Department (law enforcement agency).

Dated:_____

_____
Judge, District Court
Justice, Superior Court

Attested a true copy this date_____, 19_____.

_____
Clerk, District Court
Clerk, Superior Court

STATE OF MAINE

On the_____ day of_____, 19_____, I made service of the Order For Protection From Abuse by delivering a copy in hand to the defendant at _____

_____

Name_____

Title _____

Agency _____

Figure 8

Sample Detailed Order of Protection

STATE OF MAINE

SUPERIOR COURT
_____, ss
Docket No. _____

DISTRICT COURT
Division of Southern Cook
Location Lexington
Docket No. DV-_____

MARY B.

Plaintiff

vs.

HOWARD U.

Defendant

ORDER FOR PROTECTION FROM ABUSE

After due notice and full hearing on the merits of the Complaint for Protection from Abuse, pursuant to 19 M.R.S.A. §761 *et seq.*, and the following parties being present: ☐ Plaintiff ☐ Defendant,

THE COURT FINDS THAT:

The parties are family or household members; and, the Plaintiff was abused by the Defendant.

THEREFORE, it is hereby ORDERED that:

☒ (A) The Defendant is prohibited from threatening, assaulting, molesting, attacking, harassing or otherwise abusing the Plaintiff and any minor child(ren) residing in the household.

☒ (B) Defendnat is prohibited from going upon the premises of any separate residence of the Plaintiff.

☒ (C) Plaintiff is granted possession of and the Defendant is excluded forthwith and prohibited from entering the residence at 10 Street, Lexington, Maine.

☒ (D) The parties' personal property and household goods are divided as follows:
Each party shall retain their own personal property. Defendant to return Plaintiff's winter clothing and kitchen utensils.
and the following order for protection of property are entered:
Defendant shall not take, convert, damage or destroy property in which Plaintiff has a legal interest.

☒ (E) Plaintiff is awarded custody of the minor child(ren), whose names and ages are as follows:
SALLY (aged 7); and,
BOBBY (aged 5).
Defendants' rights of visitation are limited as follows:
Supervised visitation at home of Plaintiff's parents, Saturdays from 9:00 a.m. until 6:00 p.m. ~~Defendant to give twenty-four hours advance notice to parent~~ if he chooses to exercise visitation. Defendant to refrain from drinking when exercising visitation.

A VIOLATION OF ANY ABOVE ORDER IN PARAGRAPHS A THROUGH E IS A CLASS D CRIME

It is further ORDERED and DECREED:

☒ (F) The Defendant receive counselling from a social worker, family service agency, mental health center, psychiatric or other guidance service, to wit: Substance abuse counseling at Community Center.

☒ (G) That Defendant pay the sum of $35.00 per week, per child, toward the support of said child(ren) and $0.00 per week toward the support of the Plaintiff, first payment(s) due April 26, 19 86.

☒ (H) That said child support payments be payable to the Maine Department of Human Services so long as said child(ren) are receiving Aid To Families with Dependent Children.

☒ (I) That the Defendant pay to Mary B., the Plaintiff, the sum of $200.00 forthwith, a monetary compensation for losses suffered as direct result of the abuse.

☐ (J) That _____ pay to _____ the sum of $_____ as counsel fees.

☒ (K) It is further ORDERED and DECREED: Defendant is not to contact Plaintiff concerning visitation or for any other reason. Defendant is not to follow the Plaintiff or make any contact with her, including her place of work at 50 Payson Terrace, Northport. Defendant is not to telephone Plaintiff for any reason at her home, workplace, or any other known location.

A WILLFUL VIOLATION OF ANY ABOVE ORDER IN PARAGRAPHS F THROUGH K IS CONTEMPT OF COURT

These orders are effective forthwith and shall remain in full force and effect until April 19, 19 87 (up to one year) unless earlier modified or vacated by order of court.

Copies of this Order shall be furnished by the Clerk of the Lexington Police Department (law enforcement agency). It is ORDERED that a copy of this ORDER be served in hand on the Defendant by the Lexington Police Department (law enforcement agency).

Dated: _____

_____
Judge, District Court
Justice, Superior Court

Attested a true copy this date _____, 19____.

_____
Clerk, District Court
Clerk, Superior Court

STATE OF MAINE

On the _____ day of _____, 19____, I made service of the Order For Protection From Abuse by delivering a copy in hand to the defendant at _____

_____

Name _____

Title _____

Agency _____

Figure 9 *
Protection Order Relief Authorized by Statute by State

What Relief, Explicitly Mentioned in Statute, May Be Granted in Full Order[1]	Alabama	Alaska	Arizona	California	Colorado	Connecticut	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska
No further abuse	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
No contact		✓	✓	✓		✓	✓	✓	✓	✓	✓					✓	✓						✓		
Stay away from residence, etc.		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓		✓	✓	✓[a]		✓	✓		✓		✓
Eviction from residence	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓[b]	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓
Abuser pays for alternate housing for victim		✓		✓				✓			✓			✓								✓	✓		
Temporary custody/visitation	✓	✓		✓		✓	✓	✓	✓	✓	✓	✓[b]	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓		
Temporary child support	✓	✓		✓			✓	✓			✓	✓[b]	✓	✓		✓	✓		✓		✓		✓		
Temporary support of spouse	✓	✓					✓	✓			✓	✓[b]	✓	✓	✓	✓	✓		✓		✓	✓	✓		
Use of certain property		✓		✓				✓			✓			✓		✓	✓				✓		✓		
Monetary compensation				✓						✓	✓						✓		✓			✓	✓		
No disposition of property											✓	✓[b]		✓	✓	✓	✓					✓	✓	✓	
Counseling		✓		✓			✓	✓	✓	✓	✓	✓[b]	✓	✓	✓	✓	✓	✓			✓	✓	✓		
Costs and attorney's fees	✓	✓		✓				✓		✓	✓			✓			✓					✓	✓		
Court may order other relief	✓	✓	✓	✓		✓	✓		✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓		✓	✓	

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.

a. Although the Maryland statute permits ordering the respondent to stay away from the residence, there is no provision to order the abuser to stay away from the victim's place of employment.

b. In Indiana, this relief is available only if the parties are married and a dissolution or legal separation is not pending.

Figure 9 * (continued)
Protection Order Relief Authorized by Statute by State

What Relief, Explicitly Mentioned in Statute, May Be Granted in Full Order[1]	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming	Dist. of Columbia	Total Number of States
No further abuse	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	46
No contact	✓		✓	✓	✓			✓	✓		✓	✓	✓		✓				✓			✓	✓	✓	26
Stay away from residence, etc.	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓		✓	✓	✓		✓	✓		✓	✓	✓	39
Eviction from residence	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	48
Abuser pays for alternate housing for victim	✓	✓	✓			✓	✓	✓			✓				✓				✓		✓		✓		18
Temporary custody/visitation	✓	✓	✓	✓	✓	✓	✓	✓		✓[c]	✓[d]	✓	✓		✓	✓		✓	✓	✓	✓	✓	✓	✓	40
Temporary child support		✓	✓	✓		✓	✓	✓			✓		✓		✓	✓			✓		✓		✓		27
Temporary support of spouse		✓	✓	✓		✓	✓	✓			✓		✓	✓	✓	✓			✓		✓		✓		29
Use of certain property		✓		✓				✓					✓			✓			✓		✓	✓		✓	18
Monetary compensation	✓	✓	✓			✓		✓			✓		✓												14
No disposition of property				✓				✓	✓				✓			✓					✓		✓	✓	17
Counseling	✓		✓		✓		✓	✓						✓		✓			✓	✓			✓	✓	28
Costs and attorney's fees		✓			✓	✓	✓	✓	✓	e	✓		✓		✓		✓		✓	✓		✓		✓	24
Court may order other relief		✓	✓	✓	✓		✓	✓	✓		✓	✓	✓	✓		✓	✓		✓	✓	✓	✓	✓		38

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.

c. In Oregon, the court must include visitation rights in a protection order unless they are not in the best interests of the child.

d. In Pennsylvania, visitation is limited to supervised visitation only.

e. In Oregon, costs and attorney's fees are ordered only after a contested hearing.

today, include:

- *Matthews v. Eldridge*, 424 U.S. 319 (1976). In determining whether ex parte termination of disability benefits violated due process, the Supreme Court enunciated a "balancing test," holding that ex parte relief could constitutionally be granted in those cases in which the private interests being abridged were outweighed by the governmental interests being protected. Also essential to consider are the fairness and reliability of the existing procedures for providing due process review of the ex parte decision, and the probable value, if any, of additional procedural safeguards. Upholding the ex parte termination, the court noted that states have broad powers to enact laws to protect the general health, welfare, and safety of its citizens, and courts traditionally defer to the states in adopting reasonable summary procedures when acting under their police power.
- *Fuentes v. Shevin*, 407 U.S. 67 (1972). The Supreme Court held that a court may forego notice in certain prejudgment replevin cases if the pending action is necessary to protect an important governmental or public interest, or if the situation has a special need for prompt action.
- *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). The court ruled that providing relief prior to notice and deferring a hearing on deprivation of property may be permissible if (1) the petition includes statements of specific facts that justify the requested relief, (2) notice and opportunity for a full hearing are given as soon as possible, preferably within a few days after the order is issued, and (3) the temporary injunction is issued by a judge.

Applying these principals to protection order cases, the governmental interest in protecting against "immediate and present danger" of violence — even possible death — appears clear. As a result, most of the judges interviewed for this study, while sympathetic to the defendant's likely desire to avoid ex parte temporary eviction, did not find this private interest to be so compelling as to justify denial of relief to endangered petitioners.

This interpretation is supported by the two state supreme courts which have addressed the due process issue as applied to ex parte evictions in protection order cases. In both cases, citing the relevant U.S. Supreme Court decisions, the courts have upheld the applicable state statutes against constitutional challenge.

Using the need for prompt action argument in *Fuentes v. Shevin*, The Pennsylvania Supreme Court in *Boyle v. Boyle*, 12 Pa. D. & C.3d 767 (1979), rejected a respondent's challenge to the constitutionality of Pennsylvania's Protection from Abuse Act. The respondent had argued that an ex parte eviction of the respondent from the parties' jointly owned residence had violated due process of law by not providing him with timely notice and an opportunity to be heard before the eviction. Citing *Fuentes v. Shevin*, the court rejected the respondent's claim, noting that, while provision of notice before the presentation of the petition would better meet the goals of the Fourteenth Amendment, it would defeat the act's purpose of providing the victim with immediate protection and unduly increase the risk of violence. As such, it was constitutionally permissible to subordinate the respondent's interest in uninterrupted possession of the residence to the victim's right to immediate protection against abuse.

Relying on the balancing approach in *Matthews v. Eldridge*, the Missouri Supreme Court in *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982), upheld the constitutionality of the Missouri Adult Abuse Act against a due process challenge. In that case, the petitioner sought a writ of mandamus to compel the trial court to issue an emergency protection order to restrain her husband from entering their home, as the trial court admitted that the petitioner had shown an unqualified right to the temporary relief available under the act. However, the trial court had denied relief, ruling that the act violated due process by excluding the respondent from the home without notice or hearing, and because the facts of the case were inappropriate for presentation by an affidavit. Citing *Matthews v. Eldridge*, the Missouri Supreme Court reversed the trial court, holding that the ex parte order provisions satisfied due process requirements because the provisions were a reasonable means to achieve the state's legitimate goal of preventing domestic violence, and because the provisions afforded adequate procedural safeguards before and after any deprivation of rights. Applying the *Matthews v. Eldridge* balancing test, the court noted that the uninterrupted possession of one's home and the liberty interest in custody of one's children were significant private interests, but that the governmental interest in preventing domestic violence outweighed those interests because of the high incidence and severity of domestic violence. Concerning the reliability of existing procedural safeguards, the court noted that, as in any other application for a temporary restraining order, the petitioner must establish grounds justifying the order, the court may evaluate the petitioner's credibility in court, and the defendant has an opportunity for hearing and review soon after the ex parte order is issued.

Statutory authorization

Most statutes provide clear authorization for the court to evict an offender on an ex parte basis as long as the situation presents an emergency for which any delay might seriously endanger the petitioner's safety. For example, the Maine statute reads as follows:

4. **Interim relief.** The court, in an ex parte proceeding, may make an order concerning the care and custody of any minor children residing in the household and may enjoin the defendant from engaging in any of the following:

   A. Imposing any restraint upon the person or liberty of the plaintiff.

   B. Threatening, assaulting, molesting, harassing or otherwise disturbing the peace of the plaintiff;

   C. *Entering the family residence or the residence of the plaintiff* [emphasis added]; or

   D. Taking, converting or damaging property in which the plaintiff may have a legal interest.

While every state statute permits judges to evict the respondent as part of an ex parte proceeding, each specifies certain conditions for granting an ex parte order that are intended to safeguard the respondent from either an unconstitutional deprivation of his due process rights or unfair hardship.

1. Most statutes require a greater degree of danger to issue an ex parte order than to issue a permanent order. Specifically, the situation must be an emergency for which any delay might seriously endanger the petitioner's safety. For example, statutes in Florida, Minnesota, Mississippi, North Dakota, Pennsylvania, Tennessee, and Virginia all require "immediate and present danger" of domestic violence. Similar wording is found in other statutes – for example, "substantial likelihood of immediate danger" (Georgia, Massachusetts, Utah), "irreparable injury is likely or could occur" (Illinois, Washington), and "immediate and present physical danger" (Connecticut).

2. Most state statutes specify that evicting a batterer from the residence does not affect title to real property. For example, the Kansas statute provides that "No order or agreement under this act shall in any manner affect title to any real property."

3. State statutes generally make provision for respondents who have been evicted in an ex parte proceeding to receive a hearing within a few days to contest the eviction. For example, the Colorado Domestic Abuse Act stipulates that "With respect to an continuing [ex parte] order, on two days' notice to the party who obtained the emergency protection order or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification. The motion to dissolve or modify...shall be set down for hearing at the earliest possible time and take precedence of all matters except older matters of the same character....

Many judges feel that the opportunity afforded the respondent to obtain an emergency hearing on short notice to contest an eviction is the strongest ethical and legal justification for granting this relief. One judge reported, "I used to worry about signing temporary restraining orders and excluding the man from the home, but because he can contest the order within 48 hours I don't feel so bad anymore." Of course, even if this safeguard is not adequately addressed in the legislation, any judge can grant an immediate hearing to permit the respondent to contest the order.

Eviction relief guidelines

Judges may find it desirable to develop general guidelines for deciding when they should and can issue ex parte orders that exclude the offender from the residence. Obviously, the starting point has to be the conditions provided in the civil protection order state statute. For example, statutes vary in terms of how title to the property may limit the court's authorization to evict the offender. Most states require the petitioner to have an interest in the property (including rental property) for a judge to evict the offender. However, statutes in Alabama, Maine, Pennsylvania, South Carolina, Texas, and West Virginia authorize granting exclusive possession to the petitioner where the respondent has sole interest in the residence but owes the petitioner a duty to support. The Wisconsin statute provides for the court to "order the respondent to avoid the premises for a reasonable time until the petitioner relocates, regardless of who has title to the property. California and New Jersey explicitly authorize the court to evict the batterer even when he is the sole owner or renter of the residence. For example, the New Jersey statute provides that "sole ownership of residence by respondent-spouse shall not bar a grant of exclusive possession to the petitioner-spouse."

While theoretically either party could vacate the residence, almost all of the judges interviewed agreed that the prevention of criminal violence is better served by requiring this of the offender rather than the victim. Requiring offenders to vacate provides an appropriate deterrence to criminal behavior, whereas requiring victims to do so would discourage them from seeking needed protection (and possibly reward the offender for his crime).

Another guideline judges must address is the kind of "immediate and present danger" they believe must be shown before they will bar the offender from the home in an ex parte proceeding. Most statutes provide at least some guidance in this area. For example, the Maine statute states that the court may issue an ex parte order on the basis of "immediate and

present danger of physical abuse." While the statute does not expressly include threats of violence as "good cause," the statute defines "abuse" to include "attempting to place or placing another in fear of imminent bodily injury." The Washington State statute makes threats a basis for evicting the offender on an ex parte basis even clearer (see language emphasized):

> 26.50.070. Ex parte temporary order for protection.
>
> (1) Where an application under this section alleges that irreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the respondent, the court may grant an ex parte temporary order for protection, pending a full hearing, and grant relief as the court deems proper, including an order:
>
> (a) Restraining any party from committing acts of domestic violence;
>
> (b) Excluding any party from the dwelling shared or from the residence of the other until further order of the court; and
>
> (c) Restraining any party from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court.
>
> (2) *Irreparable injury under this section includes* but is not limited to *situations in which the respondent has recently threatened petitioner* with bodily injury or has engaged in acts of domestic violence against the petitioner.
>
> (3) The court shall hold an ex parte hearing in person or by telephone on the day the petition is filed or on the following judicial day.
>
> (4) An ex parte temporary order for protection shall be effective for a fixed period not to exceed fourteen days, but may be reissued. A full hearing, as provided in this chapter, shall be set for not later than fourteen days from the issuance of the temporary order. The respondent shall be served with a copy of the ex parte order along with a copy of the petition and notice of the date set for the hearing.

Of course, as with other issues of credibility judges must use their own discretion and best judgment in finding that the appropriate level of danger of abuse exists. Yet, several judges stressed that, while many courts have their "horror story" about a woman who made life difficult for her husband or boyfriend through fraudulent claims of abuse, documented instances of women abusing the process are rare. (Several judges, however, report that abuses of the protection order process that do occur are usually by defendants requesting a mutual order out of spite or to gain a tactical advantage, or by men who file for an order to quickly gain custody of children.) Certainly, the presence of visible injuries is considered by most judges to be one valid indicator of imminent danger. Even absent signs of physical abuse, however, many judges report that, on balance, they would much prefer to err on the side of protecting a victim from potential physical injury than to spare an alleged offender the temporary deprivation of mere property.

Most of these judges regard ex parte eviction as the single most effective remedy for most cases of domestic abuse. However, they add that several other types of relief also usually need to be provided to victims either in the temporary or the permanent order. These other types of relief are reviewed below.

No-Contact Provisions

Many judges specify in the order the types of contact the respondent may and may not have with the victim — even when the order enjoins any contact at all. Texas' civil protection order statute requires that "[T]he court shall specifically describe the prohibited locations and the minimum distances therefrom, if any. . . ." Some judges are careful to record how the batterer may obtain his property and whether the parties may meet together with attorneys. One judge specified that the victim and her husband could both attend their son's upcoming wedding. These judges are also careful to specify no telephone contact in the order — including calls to the victim's workplace. The need for identifying the victim's workplace is important to prevent misunderstanding by the respondent or the police. For example, one batterer terrified his wife by repeatedly parking across the street from where she worked so she could see him from her desk. Her supervisor became angry as her work began to deteriorate. However, the police reported there was nothing they could do because this behavior was not specifically prohibited in the protection order. Thus, unless the victim's work address is unknown to the abuser and the victim feels safer keeping it confidential, it should be specified.

Judges have found that in some cases in-laws can threaten the victim unless the protection order explicitly enjoins them as well from contact with the victim. Recognizing this, the Hawaii statute requires that the order "shall not only be binding upon the parties to the action, but also upon their officers, agents, servants, employees, attorneys, or any other persons in active concert or participating with them." However, some judges report that language referring to "people acting on the respondent's behalf" is not sufficient, since a police officer called to the scene may have no way of evaluating who is an agent of the offender; therefore, the names of these individuals should be written in the order. It is also important to include the names and ages of all affected children.

Child Custody

Statutes in 41 states specifically authorize judges to award temporary custody of any children to the victim. In *State ex rel. Williams v. Marsh* (626 S.W.2d 223 [Mo. 1982]), citing the U.S. Supreme Court case of *Matthews v. Eldridge*, 424 U.S. 319 (1970), the Missouri Supreme Court upheld against due process challenge a provision of the Missouri Adult Abuse Act authorizing the ex parte award of temporary custody of minor children to the plaintiff. As noted above, the court relied on the *Matthews v. Eldridge* balancing test (discussed in Chapter 2) to rule that although the liberty interest in custody of one's children was a significant private interest, the governmental interest in preventing domestic violence outweighed the private interests because of the high incidence and severity of domestic violence. The court also based its decision on the statute's fifteen-day limitation on the effectiveness of an ex parte order, after which a hearing must take place at which the batterer may contest the custody provision of the temporary order.

Many judges feel reassured in awarding the victim custody precisely because state statutes typically specify that the custody determination is only temporary. They also find that awarding the victim custody helps to protect her from unnecessary contact with the offender which could lead to a resumption of violence. Such a custody decision protects the children from being abused by the offender — an important consideration since many advocates are concerned that batterers who abuse their partners may also abuse the children.

Visitation

Judges and victims alike agree that nowhere is the potential for renewed violence greater than during visitation. In recognition of this opportunity for trouble, the Minnesota Domestic Abuse Act provides that "If the court finds that the safety of the victim or the children will be jeopardized by unsupervised or unrestricted visitation, the court shall condition or restrict visitation as to time, place, duration, or supervision, or deny visitation entirely, as needed to guard the safety of the victim and the children." Vermont's civil protection order statute authorizes the court to include visitation rights, if requested, "unless the court finds that visitation will result in abuse, in which case the order shall specify conditions under which visitation may be exercised so as to prevent further abuse."

Many judges include explicit conditions for visitation in their orders, specifying neutral pick-up and drop-off locations, times and days of the week, and the involvement of neutral third parties. One judge sometimes suggests that the victim have the offender come to the police station to pick up and drop off the children. Some judges also stipulate in the order that the respondent may not drink or take drugs before or during the visit, and that the victim may refuse visitation if the offender appears to have violated this condition. Some orders permit the victim to cancel the visitation if the offender shows up more than 20 or 30 minutes late. Permitting the order to indicate that visitation "will be arranged later" is particularly risky.

Judges find they cannot always rely on the petitioner to anticipate and raise the kinds of difficulties that may arise over visitation — given the emergency need for self-protection, the petitioner may not have even thought of the problem. The family court judge who handles protection orders in Philadelphia therefore questions petitioners regarding the kind of visitation arrangement that will protect them from further abuse. The judge asked one woman who had received repeated and severe beatings, "Do you really want the order to permit him to come to your house to pick up the kids — that can cause a lot of problems if he comes drunk or gets angry if you say the children are sick and can't come out." The victim agreed it was risky and asked that the order provide for visitation only at her father's house. This judge also expresses concern about the batterer's ability to take care of the children during visitation. She asked one victim how the woman could trust her husband to take care of the children since he was an alcoholic. She asked another victim who planned to permit her boyfriend to take their baby every other weekend if he had ever bathed a seven-month old child (he had). The judge then asked if the man's mother or father were alive, how old they were, and whether they could help out (they could).

The decision to grant visitation rights can be further complicated when the victim reports that the offender has also used or threatened violence against the children. Such parental abuse can motivate some children to resist seeing their father, even under conditions of supervised visitation. In these cases, not only protection of the petitioner, but also the physical safety and emotional well-being of their children, should be considered in establishing visitation rights.

In some jurisdictions, courts have helped locate safe places for visitation, such as churches and synagogues. Duluth provides a visitation center where offenders can schedule visitation without having to telephone the victim, the victim can deliver the children to the offender and pick them up in the presence of center staff, or supervised visitation can take place to prevent child abuse.

Some judges have had doubts about the constitutionality of restricting visitation in a protection order. However, in *Marquette v. Marquette*, 686 P.2d 990 (Okla. Ct. App. 1984), the Oklahoma Court of Appeals, citing the balancing test of *Matthews v. Eldridge*, supra, ruled that restraining the defendant from visiting and communicating with the couple's minor children did not violate the defendant's due process rights even though the order had been granted in an ex parte

hearing. Although the ex parte order had significantly interfered with the defendant's visitation rights, the court held that the action withstood the due process challenge in light of the procedural safeguards employed under the act before the ex parte order was issued, the requirement for a hearing within ten days thereafter, and the state's interest in securing immediate protection for victims of abuse.

Incorporating detailed visitation conditions in the protection order can be time consuming. One way to expedite the process is to have clerks, victim advocates, or attorneys provide petitioners with a short form on which to record before the hearing the visitation arrangements they prefer. A sample form is provided in Figure 10. Washington, D.C., saves court time by assigning the negotiation over visitation rights to trained Domestic Mediators after the protection order has been issued. (See Chapter 3, footnote 2.)

Mandatory Counseling

Statutes in 28 states and the District of Columbia authorize judges to order counseling for the respondent. Even without specific authorization, judges can often require counseling based on statutory authorization for the court to provide for "such additional relief as the judge deems proper."

Some judges have found that mandatory counseling that is specifically designed to treat domestic violence can teach some batterers non-abusive ways of relating to their partner. Other judges, while skeptical that counseling can accomplish this goal (or who feel it is not the court's responsibility to "cure" the offender), nonetheless believe that mandatory counseling can serve a useful purpose by reinforcing the court sanctions. The counseling sessions become a constant reminder to the batterer that the court and community will not tolerate his violent behavior.

In cases in which the offender is a substance abuser, many judges and victims favor outpatient or voluntary inpatient chemical dependency treatment programs. However, because these programs do not address the issues of violence or control, they should not be viewed as an effective substitute for batterer counseling. In some cases, addiction counseling may be needed first (to get the offender sober enough to address his violence problem), with batterer counseling to follow.

Some judges shy away from mandatory counseling in jurisdictions in which there is no procedure available to monitor attendance; offenders may simply attend a couple of sessions and announce to their partner, "I'm cured." This can lead to a sense of false security on the part of the victim, thinking she is now safe from further abuse. As a result, judges in some jurisdictions have arranged on their own for the counseling to be monitored. Some judges require periodic written notification by a counselor that the respondent is attending his sessions. If he is not, the judge can issue a summons and find the respondent in contempt of court.

Duluth has one of the most carefully monitored counseling systems. Judges in Duluth normally order respondents who will have ongoing contact with the victim to be evaluated by the Domestic Abuse Intervention Program, a local program that provides counseling and education for men who batter. The protection order requires the men to follow the program's recommendations. Typically, the program will contract with the offender for a twenty-six week counseling and education program, the main focus of which is counseling for batterers. The batterer may also be required to participate in individual therapy, seek psychiatric help, or participate in an out-patient drug dependency program. The Domestic Abuse Intervention Program is then appointed by the court as an interested third party in the case, permitting the program to request a review hearing or ask the court to initiate a contempt of court action in the event of any attendance problems. Table 1 presents the dispositions and level of compliance for 224 men whose order of protection required them to contract with the program.

Most state statutes that provide for mandatory counseling for the batterer also authorize mandatory counseling for the victim. Several judges voiced strong objections to this practice. Requiring the victim to enter counseling may put her in increased jeopardy by suggesting to the batterer that he is not responsible for his violence and thereby giving him an excuse to continue his abuse. Couples' counseling improperly conducted may have the same effect; furthermore, it may create a setting in which the victim is at an inherent disadvantage given her fear of the batterer. Some judges do suggest to the victim that even though she has done nothing wrong, she might wish to consider counseling for help in dealing with the emotional trauma she is experiencing. For example, victims in Duluth are encouraged by the court and victim advocates to attend educational groups held by a local women's coalition.

Occasionally judges find unmistakable evidence that both partners in a relationship have a problem with violent behavior. When there is clear-cut evidence that both parties to an action are violent, it may be appropriate to order individual counseling for the petitioner as well as for the respondent. For example, the Duluth program has mandated 34 women assailants into counseling, making clear to them that they may act violently in self-defense but not in retaliation for their partner's abuse. However, a protection order still needs to be issued to protect the physically weaker or less violent party from the disproportionate violence of the stronger partner.

Before making a determination that a petitioner also has a problem with violence, it is essential to assess (1) issues of credibility and (2) issues of self-defense.

Figure 10

Hypothetical Visitation Form for Petitioners to Complete before the Hearing

You can run into a lot of problems when your partner comes to visit with your children. To prevent any problems, please answer the questions below.

1. Do you believe that it may be dangerous for your child or children if your partner is allowed to visit with them?

   No _____

   Yes _____ If so, why may it be dangerous to the child(ren)?

   _____

   _____

2. Is there a safe place for your partner to pick up the children?

   Your home? ___

   Your parents' home? ___

   Church or synagogue? ___

   Police station? ___

   Other (fill in) _____

3. Do you want someone else to be present when your partner is with the children, such as your parents or a clergy person?

   No ___

   Yes ___ If so, who should be there? (fill in) _____

   _____

4. When do you want your partner to be able to visit with the children?

   What day(s) of the week? _____

   What time of day? from ___ to ___

   How many times each month? ___

5. Does your partner have a drinking or drug problem?

   No _____

   Yes _____ If yes, do you want the order to provide that your partner cannot visit with the children after drinking or taking drugs? No ___

   Yes ___

Table 1
Disposition of 224 Batterers Referred by the Court to the Duluth Domestic Violence Intervention Project[1]

	Number	Percent
Total cases	224	100%
Left county	13	6%
Counseling ordered	200	89%
No counseling ordered	11	5%
Completed counseling	150	75%
Jailed for contempt	7	3.5%
Other sanctions for non-compliance[a]	20	10%
Protection order expired before counseling was completed	20	10%
Did not complete and no court sanctions	3	1.5%

[1] Adapted from Ellen Pence, The Justice System's Response to Domestic Assault Cases: A Guide for Policy Development (Duluth, Minnesota: 1985).

[a] For example, entry into an alcohol or drug program.

With regard to credibility, many offenders admit to having engaged in abusive behavior but attempt to belittle it by saying, "I only slapped her," or "I didn't really hurt her." However, other offenders deny their violent behavior. By contrast, judges and victim advocates report that it is rare that victims invent the offense or exaggerate its nature. While victims may seen incoherent in court or not recall events clearly, such confusion and memory loss may be symptoms of having been abused.

In the case of self-defense, South Carolina prescribes that "[T]he petitioner's right to relief . . . is not affected by the use of such physical force against the respondent as is reasonably believed by the petitioner to be necessary to defend the petitioner or others from imminent physical injury of abuse." The Texas and Maine statutes have similar provisions, while no state specifically states that that self-defense will disqualify a petitioner from relief, or will make her vulnerable to a counter petition. Accordingly, it may be necessary for judges to consult their state statutes and case law on self-defense in general.

Mutual Orders

In those cases in which both parties have engaged in violent behavior, judges sometimes issue mutual orders enjoining both partners from engaging in violence, often because of the difficulty or inconvenience of evaluating the evidence and determining the true perpetrator. There are, however, compelling reasons to use this remedy sparingly.

In *Fitzgerald v. Fitzgerald* (406 N.W.2d 52 [Minn. Ct. App. 1987]), the Minnesota Court of Appeals ruled that the issuance of a mutual restraining order in a domestic abuse action, following a hearing at which only the wife requested an order and at which there was no evidence that the wife abused the husband, was reversible error. In appealing the order against her, the wife argued that she was prejudiced by such an order because it suggested that she was found to have committed acts of domestic violence and because it gave the abuser the message that he was not going to be held accountable for his violent behavior. The petitioner also asserted that mutual restraining orders are less enforceable than orders against just the batterer because the police may be misled as to which party actually has a history of battering.

Several police officers we interviewed reported that when a domestic violence victim calls them to the scene of a violation they are uncertain how to proceed when there is a mutual protection order; they typically end up doing nothing – or arrest both parties. In several of the jurisdictions studied, when a respondent requests a mutual order, he is required to file for a protection order of his own. The credibility of the allegations is then carefully evaluated before granting a second order.

Chapter 5: Enforcement of Orders

Enforcement is the Achilles' heel of the civil protection order process, because an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security. Offenders may routinely violate orders, if they believe there is no real risk of being arrested.

For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported. These conditions were not in place in most of the jurisdictions examined for this report. Indeed, there was considerable anecdotal evidence from the sites that some batterers flout civil protection orders with impunity.

This situation, while deplorable, is not without remedy; courts can develop, publicize, and monitor *a clear, formal policy* regarding violations in order to encourage respect for the court's order and to increase compliance.

Two considerations make the development of a formal policy particularly critical. First, enforcement of protection orders is an especially troublesome problem for many law enforcement officers. Many police officers believe they have no legal authority to arrest an offender they find in the victim's home in violation of the protection order when it appears that the victim may have invited an evicted offender back into the home, or when the offender has not yet engaged in any further physical abuse. However, police officers in 40 states which make a violation a misdemeanor or criminal contempt may arrest any batterer who violates a protection order as long as they witness the violation. In addition, in 24 states warrantless arrest based on probable cause is authorized for a violation of protection order, and police may arrest the offender without a warrant even if he has fled the victim's residence.

The second reason a formal court policy with regard to enforcement is so important is that there appears to be a conflict between the compliance purposes of the civil protection order and the punitive approach authorized in the statute when the offense constitutes criminal contempt or a misdemeanor. Certainly, in those states in which a violation is statutorily defined as only civil contempt, or when the court chooses to treat the violation as civil contempt (when both civil and criminal contempt are available charges under the statute), it appears that only a compliance hearing may be held. Adding to this uncertainty, many statutes leave it to the court's discretion whether to hold the violator in civil contempt or criminal contempt. There is also ambiguity regarding the due process protections defendants are entitled to receive in a civil contempt hearing and a criminal contempt hearing, a matter that case law has not definitively resolved.

These and other potential uncertainties in statutory interpretation could be addressed through statutory changes designed to promote statewide uniformity in the enforcement of protection orders. The most reliable approach through legislation for improving enforcement is to include one provision in the state statute that makes a violation a misdemeanor offense and another provision authorizing police officers to make a warrantless arrest for violation of any provision of the order. With or without such legislative change, courts can develop formal court guidelines specifying (1) what procedures law enforcement officers are statutorily required and authorized to follow and (2) what procedures judges themselves will follow in holding violation hearings. By developing and publicizing these guidelines in advance, judges would be able to achieve more uniformity of judicial response, would encourage compliance and respect for the judiciary among defendants (and their attorneys), and might avoid unnecessary and protracted appeals.

Although some provisions of a court enforcement policy must be tailored to the specific enforcement tools provided by statute, other policies are adaptable to virtually any jurisdiction. Below we discuss the components of an effective court enforcement policy, beginning with statutory authority for enforcement.

Statutory Authority for Enforcement

Figure 11 shows the charges that may be brought in each state for violating a protection order. As shown, violation of a protection order is a misdemeanor offense in 30 states. In some states, the offense is more seriously classified with subsequent violations. Ohio, for example, has made a first violation a misdemeanor of the fourth degree, a second violation a misdemeanor of the first degree, and a third and subsequent violation a felony of the fourth degree. By making a violation a crime in itself, these statutes give law enforcement officers clear authority under their arrest powers to detain anyone who commits a violation they have witnessed—in particular, the mere presence of the offender in the victim's (or family's) residence, when such is prohibited by the protection order. However, enabling police officers to make a misdemeanor arrest of any offender who violates an order provides victims with little protection because most repeat offenders have fled the scene before the officers arrive—and officers must usually obtain a warrant before arresting anyone for a misdemeanor offense they have not witnessed. To address this dilemma, statutes in 25 states

Figure 11 *
Statutory Provisions for Enforcing Protection Orders by State

Penalties for Violation[1]	Alabama	Alaska	Arizona	California	Colorado	Connecticut	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska
A. Charge																									
Civil contempt[2]	✓	✓	✓	✓	✓	✓	✓	✓			✓	a	✓	✓	✓	✓	✓	✓	✓		✓				✓
Criminal contempt[2]		✓			✓		✓				✓			✓		✓	✓		✓	✓		✓	✓		
Misdemeanor			✓	✓		✓	✓	✓	✓		✓			✓		✓	✓	b	✓		✓		✓	✓	
B. Sanction																									
Maximum jail sentence (days)				180	180[c]	365										180	3ys.	60	913	90	90	180	365		7
Maximum fine ($) (K = $1,000)				1K	5K	1K	1K									500	1K	500	5K	500	700	1K	1K		500

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.
2. The count of states with civil or criminal contempt as the offense when a protection order has been violated reflects the opinion of a practicing attorney in each state based on the language of the civil protection order state and other applicable legislation. However, it is possible that these attorneys also based their interpretation on how a violation is handled in the local jurisdiction in which they practice law.

a. Although not discussed in the Indiana statute, a violation falls under general contempt principles that are enforceable by civil contempt.

b. In Maryland, violation of the order outside the residence is defined as a misdemeanor and civil contempt. All other violations are civil contempt only.

c. In California, if a violation results in an injury, a minimum jail sentence of 48 hours is required.

Figure 11 * (continued)
Statutory Provisions for Enforcing Protection Orders by State

Penalties for Violation[1]	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming	Dist. of Columbia	Total Number of States
A. Charge																									
Civil contempt[2]		✓	✓		✓	✓		✓		✓	✓	✓			✓	✓	✓		✓	✓					31
Criminal contempt[2]			✓	✓			✓				✓		✓			✓		✓			✓		✓	✓	21
Misdemeanor	✓		✓			✓	✓	✓[d]	✓	✓		✓	✓	✓		✓	✓	✓		✓		✓	✓		30
B. Sanction																									
Maximum jail sentence (days)			180		180		365	e	365	180	180	365	365		10	365	180	180			30	270		180	26
Maximum fine ($) (K = $1,000)			1K		250		1K	f	1K	300		1K	1.5K			2K	1K	1K			1K	1K		300	27

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.
2. The count of states with civil or criminal contempt as the offense when a protection order has been violated reflects the opinion of a practicing attorney in each state based on the language of the civil protection order state and other applicable legislation. However, it is possible that these attorneys also based their interpretation on how a violation is handled in the local jurisdiction in which they practice law.

d. Penalities in Ohio are as follows: First conviction – fourth degree misdemeanor; second conviction – first degree misdemeanor; third or subsequent conviction – felony of the fourth degree.

e. In Ohio, a first conviction carries a maximum sentence of 30 days; a second conviction, 6 months; third or subsequent conviction, 5 years.

f. Maximum fines in Ohio are as follows: First conviction – $250.00; second conviction – $1,000.00; third conviction – $2,500.00.

permit or require officers to make an arrest *without a warrant* when they have probable cause to believe the respondent has violated an order. (See Figure 12.)

In several states, the failure of police to arrest violators of protection orders has led to considerable public concern, particularly in cases in which serious injury or death later resulted. In response to these concerns, statutes in 13 states mandate, rather than simply permit, warrantless arrest for violation of a protection order. For example, the Minnesota statute prescribes that:

> A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order granted pursuant to this section restraining the person or excluding the person from the residence, if the existence of the order can be verified by the officer.

If there is an eviction clause in the order, the Minnesota and New Hampshire statutes require arrest whenever the offender is found in the home even though the victim has not reported his presence to the police. Oregon's statute mandates arrest even if the victim objects to the perpetrator's being taken into custody, thus removing the onus of "you had me arrested" from the victim.

Nine states classify violation of a protection order exclusively as criminal contempt rather than as a misdemeanor offense.[1] This approach offers less protection for victims than classifying a violation as a misdemeanor because many—perhaps most—police officers are unaware that they may arrest any offender they witness violating a protection order even if the charge is only criminal contempt, and that they may arrest him based on probable cause without having seen the violation if state statute permits warrantless arrest for a violation. According to constitutional law scholars, criminal contempt is treated the same as a misdemeanor for purposes of arrest powers unless otherwise provided for by state statute, state constitution, or state appellate court ruling.[2]

To avoid any uncertainty about police arrest powers, states in which a violation is not a misdemeanor but only criminal contempt can either amend their legislation to make a violation a misdemeanor or do what Pennsylvania has done—enact legislation expressly authorizing police to arrest without a warrant on a charge of indirect criminal contempt any defendant who violates a valid protection order. (Pa.Stat.Ann., Tit. 35 §10190 [Purdon 1988 Supp.]). At least some law enforcement officers in Pennsylvania take advantage of these warrantless arrest powers. In one incident, police called to the scene of a protection violation

> ...could not locate Miller [the defendant] following a search of the area.... Later that same day, however, Miller was arrested for indirect criminal contempt pursuant to the PFA [protection from abuse] order when he was found on the front porch of the decedent's [plaintiff's] dwelling. He was committed to the County Prison. (*Dudosh v. City of Allentown* 655 F. Supp. 381 (I.D. Pa 1987)

Violation constitutes exclusively civil contempt in 19 states.[3] Statutes that make a violation merely civil contempt have the disadvantage of failing to provide immediate protection to the victim when there is a violation which does not otherwise qualify as an arrestable offense. Unless otherwise specified in the legislation, constitutional law scholars believe that law enforcement officers have no arrest powers for civil contempt because the defendant must be given an opportunity by a judge to "undo" his behavior. Such opportunity must be afforded because the purpose of a civil contempt finding is not to punish but to secure compliance with the directives of the court.

Finally, many protection order statutes refer only to "contempt" without indicating whether a violation constitutes civil contempt or criminal contempt; other statutes provide for both civil and criminal contempt. In these jurisdictions, other state statutes or case law must be consulted to determine which type of contempt may be charged.

Figure 13 summarizes the arrest powers of law enforcement officers depending on whether (1) a violation is a misdemeanor, criminal contempt, or civil contempt, and (2) there is statutory authorization to make a warrantless probable cause arrest for a violation.

The courts can play a key role in setting the tone for aggressive enforcement by the police—a role which becomes even more crucial when the procedures provided by statute contain potential weaknesses. Judges can provide leadership by informing law enforcement personnel about the statutory provisions for arresting violators and about the potential liability of police officers to civil suits if they fail to comply with the law. Judges can also facilitate the appropriate issuance of arrest warrants as needed. These and other methods for encouraging compliance by police officers and cooperation with judicial goals are discussed in detail below under Promoting Effective Law Enforcement.

Aggressive enforcement and prompt case handling by the court itself is also crucial. While police officers can assist the court by arresting and detaining offenders who violate protection orders, the court will ultimately be responsible for long-range enforcement. The remainder of this chapter addresses judicial enforcement methods.

Admonishing Defendants

Several judges stressed that the court needs to use every contact it has with offenders and victims to make clear exactly what the order of protection enjoins and that a violation is

a punishable offense. Deterrence, long recognized as a primary goal of criminal justice, is best enhanced when the potential offender clearly understands the likely consequences of further prohibited behavior.

In one observed case, after reviewing the terms of a protection order with the respondent, the judge looked at the offender and asked: "Do you understand what you've agreed to?" and, "Do you know the penalty for violating this order?" The judge then went on to say that the "bottom line" was that the defendant was to stay completely away from the victim—even if the woman invited him to return. The defendant then asked, "Can I approach her to get my kids at my parents' house?" "No," said the judge, "she will approach you."

Lectures from the bench, in particular, can be eye-opening to many batterers. The Attorney General's Task Force on Family Violence urges judges "not to underestimate their ability to influence the defendant's behavior," noting that "[e]ven a stern admonition from the bench can help deter the defendant from future violence."[4] A study of nonstranger violence sponsored by the National Institute of Justice found that "...judicial warnings and/or lectures to defendants concerning the inappropriateness and seriousness of their violent behavior apparently improved the future conduct of some defendants."[5] A judge in Portland, Maine, also makes a practice of informing respondents that while the order is for the protection of the victim, it is an order *of the court*, and taken very seriously by the court. Many judges also urge both respondents and victims to appear for any future hearings.

Admonishing the defendant can also have an impact on the victim. Legal advocates report that some victims are benefited by clear messages that the court system supports their belief that they do not have to tolerate assaultive behavior. Equally important, some judges carefully instruct victims to report any violations to the police and other appropriate agencies in the community.

Creating a highly dignified courtroom atmosphere alone can help protect victims because some offenders may be amenable to change if they see that the court is determined to treat their behavior as a serious matter. To further convey this message, a judge in Washington, D.C., always seats petitioners on one side of the courtroom and respondents on the other side; she also requires the respondent to remain in the courtroom for ten minutes after the end of the proceeding to give the victim time to leave undisturbed.

Establishing Procedures to Modify Orders

Many judges report being concerned when victims agree to allow an offender back into the home even though the protection order enjoins them from living together. If the two parties want to live together again, there is little the court can do to stop them, but judges fear that victims in these cases may be responding to intimidation or undue influence.

For this reason, judges in Philadelphia and Duluth inform petitioners that they must come back to court to modify the protection order if they decide to try living with the respondent again. By having the victim return to court, the judge can reassess the situation and make sure the victim is aware of all the risks of allowing the offender back into the home and is freely choosing to permit him to return. In Duluth, a modification is usually granted only if the defendant is participating in counseling, if the Domestic Abuse Intervention Project (which monitors counseling for abusers) has no objection and if there have been no allegations of child abuse. The judge can also make clear that the no-abuse provision can remain in force even though the eviction order is vacated.

Some judges warn the victim that if the offender returns to the home before she has modified the order to permit this, the police may be reluctant to protect her if he later renews his violent behavior because they feel she is abusing or violating the order. In Duluth, when a victim obtains a modified order permitting renewed cohabitation, city police officers have proven to be more likely to enforce the remaining no abuse prohibition of the order if the violence re-occurs.

Petitioners are more likely to return to court for a modification if the application process is a simple one. Many victims in Duluth seek modifications because the court has set up a procedure that is free, quick, and encouraged by judges and advocates alike.

Monitoring Compliance

In the majority of study sites, monitoring compliance with the protection order is left to the victim. However, when the court takes responsibility for monitoring compliance or delegates this task to an appropriate agency, it sends a message that a violation is not only harmful to the victim but also a criminal offense.

For this reason, judges in Duluth have an arrangement with the Domestic Abuse Intervention Project, which provides a counseling and education program for batterers, to monitor the behavior of respondents who are ordered into the program by the court. Monitoring occurs in three ways. Project staff review police records each day and inform the court if an incident involving a protection order violation has occurred. Project staff also contact each victim once a month to learn of any renewed violence. Finally if an offender fails to attend counseling sessions or reports new abuses or violations,[6] project staff request a court hearing. If the offender is found in contempt of court, he is usually sentenced to jail but (for a first violation) given the option of completing the program while serving a probated sentence.

Figure 12 *

Police Powers and Responsibilities for Enforcing and Facilitating Protection Orders By State

Police Powers and Responsibilities[1]	Alabama	Alaska	Arizona	California	Colorado	Connecticut	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska
A. Discretionary Arrest – Warrantless																									
(a) If probable cause of abuse		✓	✓				✓	✓		✓	✓	✓[a]	✓[b]	✓	✓	✓		C	✓				✓		
(b) If probable cause of order violation		✓	✓		✓	✓	✓			✓	✓			✓		✓	✓		✓	✓			✓		
B. Mandatory Arrest – Warrantless																									
(a) If probable cause of abuse						✓							✓[d]			✓									
(b) If probable cause of order violation													✓				✓				✓				
C. Other Police Responsibilities																									
Train officers		✓		✓		✓	✓	✓		✓					✓		✓						✓		✓
Establish procedure for verifying orders in effect to field officers		✓	✓	✓		✓	✓		✓		✓				✓		✓		✓		✓		✓	✓	
Use all means to prevent abuse											✓		✓		✓	✓	✓		✓						
Enforce orders		✓		✓	✓	✓	✓	✓			✓		✓		✓	✓	✓		✓		✓				
Provide victim assistance		✓		✓		✓	✓			✓	✓		✓	✓	✓	✓	✓		✓	✓					
Inform victim of legal rights		✓	✓	✓		✓	✓			✓	✓		✓		✓	✓	✓		✓	✓	✓		✓		
Supervise eviction of abuser		✓		✓				✓	✓		✓				✓	✓					✓				
Report and keep records		✓		✓		✓	✓		✓	✓	✓		✓		✓	✓	✓				✓		✓		

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned – that is, required, authorized, or prohibited – in the civil protection order statute or in other applicable legislation.

a. Indiana provides that police may arrest without a warrant when probable cause to believe that battery with bodily injury has occured and that arrest is necessary to prevent reoccurance of a battery.

b. In Iowa, arrest is discretionary if no injury results; otherwise it is mandatory.

c. There is no specific warrantless arrest provision in the Maryland Family Law Article. However, a separate statute, Article 27 , §594B, provides for warrantless arrest when: a) the violence involves spouses; b) there is evidence of physical injury; c) the incident is reported to the police within two hours; and d) unless there is an arrest, there will be further harm to the victim, the assailant will get away, or evidence will be destroyed.

d. In Iowa, arrest is mandatory if injury results; otherwise it is discretionary.

Figure 12 * (continued)

Police Powers and Responsibilities for Enforcing and Facilitating Protection Orders By State

Police Powers and Responsibilities[1]	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming	Dist. of Columbia	Total Number of States
A. Discretionary Arrest — Warrantless																									
(a) If probable cause of abuse		✓[e]		✓			✓	✓	✓		✓		✓		✓	✓	✓						✓		23
(b) If probable cause of order violation		✓[e]			✓		✓	✓			✓		✓		✓	✓	✓	✓			✓		✓		25
B. Mandatory Arrest — Warrantless																									
(a) If probable cause of abuse	✓		✓							✓		✓							✓	✓		✓			10
(b) If probable cause of order violation	✓		✓	✓		✓				✓		✓			✓	✓				✓		✓			13
C. Other Police Responsibilities																									
Train officers			✓					✓			✓	✓											✓		15
Establish procedure for verifying orders in effect to field officers		✓	✓				✓	✓		✓	✓			✓	✓	✓	✓	✓		✓	✓	✓	✓		28
Use all means to prevent abuse		✓				✓				✓		✓	✓										✓		12
Enforce orders	✓		✓	✓				✓		✓	✓	✓	✓		✓		✓	✓		✓		✓	✓	✓	28
Provide victim assistance		✓			✓	✓	✓					✓	✓		✓		✓	✓	✓				✓		24
Inform victim of legal rights		✓	✓		✓	✓		✓	✓	✓	✓	✓	✓		✓	✓	✓		✓				✓		30
Supervise eviction of abuser		✓	✓				✓	✓				✓	✓					✓	✓						16
Report and keep records			✓				✓	✓	✓			✓			✓	✓			✓				✓		22

* The matrix that was used for this chart is adapted from Lerman and Livingston, "State Legislation on Domestic Violence," *Response to Violence in the Family and Sexual Assault*, Vol. 6, No. 5 (Center for Women Policy Studies [CWPS] Sept./Oct. 1983). The CWPS matrix was more detailed and covered more different types of provisions. The context of this chart is not taken from the CWPS chart but is based on independent analysis of the statutes. This analysis was verified by an attorney in every state except Minnesota and North Carolina in the spring of 1988.

1. Features of the law are recorded in the matrix only if they are explicitly mentioned — that is, required, authorized, or prohibited — in the civil protection order statute or in other applicable legislation.

e. Arrest without a warrant on a charge of a misdemeanor or violation of a valid protection order is lawful in New Hampshire whenever the officer has probable cause to believe that the person to be arrested has assaulted a family or household member within the previous six hours.

Figure 13
Law Enforcement Officers' Arrest Powers Under Six Combinations of Statutory Provisions Involving Protection Order Violations

Statutory Provisions	Arrest Powers[a]
I. a. Violation is a **misdemeanor** b. No warrantless probable cause arrest for violation	• Peace officers may arrest for violation of any provision of protection order that they witness • Peace officers may arrest a violator who is found in the victim's home if the order includes an eviction provision
II. a. Violation is a **misdemeanor** b. Warrantless probable cause arrest for violation	• Peace officers may make warrantless arrest for violation of any provision of protection order[b]
III. a. Violation is **criminal contempt** b. No warrantless probable cause arrest for violation	• Peace officers may arrest for violation of any provision of protection order that they witness • Peace officers may arrest a violator who is found in the defendant's home if the order includes an eviction provision
IV. a. Violation is **criminal contempt** b. Warrantless probable cause arrest for violation	• Peace officers may make warrantless arrest for violation of any provision of protection order[b]
V. a. Violation is **civil contempt** b. No warrantless probable cause arrest for violation	• Peace officers may not arrest for violation[c]
VI. a. Violation is **civil contempt** b. Warrantless probable cause arrest for violation	• Peace officers may still not arrest for violation[c]

[a] In addition to any powers granted by statute to arrest on the grounds of a violation of a protection order, police officers may in all cases arrest for any *witnessed* act that by statute is a *misdemeanor* offense in their jurisdiction (e.g., simple assault, threats, trespass, breaking and entering), and they may arrest on probable cause for *any act* that is a *felony* (e.g., threatening with a firearm, aggravated assault).

[b] The U.S. Supreme Court has placed two limitations on warrantless searches regardless of purpose. In *Payton v. New York*, 445 U.S. 573 (1980), the court ruled that, absent consent or exigent circumstances, entry into a home to conduct a search or to make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. In addition, in *Steagald v. United States*, 451 U.S. 204 (1981), the court ruled that, absent exigent circumstances (as in fresh pursuant) or consent, police must obtain a search warrant to enter the residence of a third party where the offender is located in order to arrest him. The search warrant must be based on probable cause that the offender is at the location to be searched.

[c] While the constitutionality of arrest for civil contempt does not appear to have arisen, constitutional law scholars believe that in theory law enforcement officers may not arrest for this offense because the defendent must be given opportunity by a judge to "undo" his behavior since the court's role with civil contempt is not to punish but to achieve compliance with the protection order.

Judges also inform victims that they should contact the Intervention Project if the defendant violates the order. To assist in this aspect of monitoring, the Duluth Women's Coalition maintains contact with victims who have used the Coalition's services, asking them to discuss any problems or violations of the order. When violations are reported during Coalition education group meetings for victims, advocates talk to victims about reporting the violation and provide support and information to do so.

While Duluth's monitoring program is more extensive than that of other courts visited, judges in some jurisdictions require counselors to provide regular written documentation that the offender is attending his counseling sessions.

Responding to Violations

For civil protection orders to deter batterers from further abusing their partner, respondents must believe that the judge will impose a meaningful penalty for any violations.

Charging options

Depending on state statute and local procedure, violators of civil protection orders may be charged with civil contempt, criminal contempt, or the misdemeanor offense of violating a court order. (See Figure 11.) In addition, the violator may be charged with any other criminal act committed in the process of violating the order, such as criminal trespass, breaking and entering, menacing threats, or assault and battery.

Police officers in some jurisdictions report they routinely charge every offense that seems to fit a particular case and leave it to the court to determine which ones it will entertain. This helps ensure that felony level charges are brought when aggravated assault and battery has occurred. In Portland, Oregon, for example, officers charge both the violation of the protection order and assault and battery when the violation has included physical abuse. However, if the evidence seems to support the assault and battery charge, the district attorney will usually prosecute for this offense as a stronger deterrent to future violence than prosecuting for violation of the protection order.

The Portland district attorney is also concerned that prosecution for both charges might constitute double jeopardy. However, the Pennsylvania Supreme Court has held that prosecution of a man for criminal trespass, assault, and rape of his wife is not barred by a concurrent finding of criminal contempt for violating a civil protection order obtained by the victim (*Commonwealth v. Allen*, 506 Pa. 500, 486 A.2d 263 [1984]). Even though the contempt finding was based on the same conduct giving rise to the prosecution, indirect criminal contempt and other criminal charges were held to be separate offenses that serve distinct purposes and require different elements of proof. As a result, the court ruled that neither the principle of double jeopardy nor compulsory joinder barred the criminal prosecution. In the court's opinion, to hold otherwise would either seriously restrict the state's interest in punishing criminal acts or impair the effectiveness of the civil protection order statute. A similar double jeopardy case is pending in the District of Columbia Court of Appeals (*Michael Foster v. U.S.*, Docket No. 89449, Argued October 1989).

Addressing defendants' due process rights

In the 29 states in which violation of a protection order is a misdemeanor offense and the offender is so charged (rather than charged with contempt, if also authorized by statute), defendants have due process rights identical to those of any other criminal defendant. Routinely, prosecutions are handled by state prosecutors, indigent defendants are provided with counsel, and guilt must be proved beyond a reasonable doubt.

In states in which a protection order violation constitutes only civil or criminal contempt of court, however, due process requirements may be less well-defined. Some state courts which have dealt with the issue of due process in protection order contempt proceedings have not extended the full range of criminal due process rights to the contempt hearing. In *Eichenlaub v. Eichenlaub*, 33 Pa. D. & C. 3d 59 (Allegheny County 1983), *aff'd*, 340 Pa. Super. 552, 490 A.2d 918 (1985), a Pennsylvania appeals court ruled that because criminal contempt proceedings are not criminal prosecutions, a violation must be proved by clear and convincing evidence, not beyond a reasonable doubt. The court also held that, for the same reason, an abuser is not entitled to a jury trial. In a similar case, the Oregon Supreme Court ruled in *Hart v. Hathaway*, 300 Or. 231, 708, P.2nd 1137 (Or. Sup. Ct. 1984), that a criminal contempt proceeding under the Oregon Abuse Prevention Act does not constitute criminal action – criminal contempt is the violation of the court's order, not the nature of the act that violated the order. Criminal sanctions in the Act were provided to give "teeth" to the enforcement of restraining orders, not to replace normal criminal prosecutions and their accompanying entitlements. As such, the court ruled, the defendant in a criminal contempt proceeding for violating an order has no statutory or constitutional entitlement to a jury trial. This position is reflected in the Pennsylvania statute:

> (a) Upon violation of a protection order or a court approved consent agreement the court may hold the defendant in *INDIRECT CRIMINAL* contempt and punish him in accordance with law.
>
> (b) *NOTWITHSTANDING ANY PROVISION OF THE LAW TO THE CONTRARY ANY SEN-*

TENCE FOR THIS CONTEMPT MAY INCLUDE IMPRISONMENT UP TO SIX MONTHS OR A FINE NOT TO EXCEED $1,000.00 OR BOTH AND THE DEFENDANT SHALL NOT HAVE A RIGHT TO A JURY TRIAL ON SUCH A CHARGE. [Emphasis in the original.]

By contrast, the District of Columbia's Intrafamily Rules remove all ambiguity regarding the defendent's rights in a contempt process by guaranteeing the full range of due process safeguards required for all alleged criminal contemners, including representation by counsel, the presumption of innocence, the reasonable doubt evidentiary standard, compulsory process for witnesses, and the privilege against self incrimination (*Matter of Wiggins*, 359 A.2d 579, 581 n.5 [D.C. 1976]).

The judges in the present study stressed the importance of developing consistent guidelines regarding defendants' rights as part of an overall policy on court enforcement. While these guidelines must reflect state legislation and case law, they will be most useful if they offer greater detail and predictability than generally stated laws and rulings. For example, even though the violation hearing is a civil proceeding, all the judges interviewed in the study said they make sure a defendant who faces a potential jail sentence is represented by counsel. With clear and realistic guidelines in effect, the provision of appropriate due process rights to defendants need not hamper effective enforcement of protection orders.

Sentencing

Many judges order jail time for first-time protection order violators if they believe the severity of the abuse warrants incarceration, such as forced entry or any type of physical abuse or threats. These judges view a jail sentence as a necessary step to protect the victim from further abuse. Furthermore, they know that while this may be the first time the offender has violated the protection order, it is at least the second time he has committed assault and battery against the victim. These judges also believe it is important to impose a jail sentence because an order of the court has been held in disregard.

Most state statutes limit the length of jail sentence the judge may impose, with six months or one year the most common maximum sentence allowed. (See Figure 11.) The California statute mandates a minimum jail sentence of 48 hours if a violation involves an injury. Ohio's statute makes possible a severe sanction for multiple offenders by making a conviction on a third violation a felony of the fourth degree.

A jail sentence may also help motivate police officers to adopt or maintain a policy of arresting batterers who violate protection orders. Many police officers interviewed for the present study said one of their reasons for not arresting violators is that prosecutors and judges do not seem to take these cases seriously by following up arrests with swift and meaningful sanctions.

Especially in jurisdictions where jail crowding is a problem, judges must make sentencing determinations with several concerns in mind. Some judges decide whom to jail by weighing the greater need for jailing violent offenders (whether the violence is against a family member or a stranger) as compared with nonviolent offenders like prostitutes, public drunks, and the perpetrators of nonserious property crimes.

Judges have also experimented with alternative sanctions for protection order violations. In Philadelphia, the judge has used intensive probation supervision and a choice between regular attendance at counseling or a jail sentence. In Portland, Maine, and in Springfield, Illinois, some cases are plea bargained down to probation and a six- or twelve-month suspended jail sentence; if no further violation occurs during that period, the case is dismissed with no criminal record.

Several judges reported on the need to consider the victim's safety between the time of the violation and the offender's appearance in court for a violation hearing. As a result, batterers arrested for order violations in Portland, Oregon, are not granted release on their own recognizance, and an order has no statutory or constitutional entitlement to a jury trial. This position is reflected in the Pennsylvania statute: bail is usually set at $5,000. In Denver, domestic violence has been taken off the bond schedule so that suspects must stay in jail from a few hours to three days until the next court business day.[7] In Duluth, violators are usually held overnight, allowing time for shelter advocates to contact the victim and help her obtain any assistance she needs before the batterer is released. Minnesota's statute allows jailers to hold an assailant arrested under the probable cause arrest statute for thirty-six hours if the jailer believes the assailant is likely to be a danger to the victim.

Encouraging Effective Law Enforcement

Law enforcement officers play a critical role in the civil protection order process, most notably by arresting—or not arresting—offenders who violate protection orders. Law enforcement officers also have the crucial responsibilities of providing victims with information about civil protection orders, securing the immediate safety of victims, and serving protection orders.

In the absence of aggressive law enforcement, judges are rendered virtually powerless to effectively administer and uphold the law in protection order cases. As a result, judges have emphasized the need for the judiciary to take a leadership role in encouraging and demanding effective and conscientious law enforcement. Judges can appropriately

provide leadership and guidance in four key areas of police responsibility mandated by most protection order statutes: arresting violators, providing information to victims, securing the victim's safety, and serving orders.

Arresting violators

Interviews with judges, victims, and legal advocates suggest that in protection order violation cases police officers often fail to make an arrest even when they are clearly authorized – or even clearly required – to do so. As a result, it is critical that law enforcement executives and line officers alike be taught what their arrest powers and responsibilities are. As part of this education, judges can explain that in the many states which provide for or require warrantless arrest for a violation of a civil protection order and a violation is criminal contempt or a misdemeanor, such arrests will appropriately include any prohibited behavior addressed in the order, including behavior that would not otherwise constitute a chargeable offense – for example, the mere presence of the offender in the victim's home, and intimidating activity such as standing in the hallway outside the victim's apartment or observing her at her workplace. This is because the civil protection order statute has created new crimes, including all conduct prohibited by the judge issuing the order.

Police may need to be reminded that even with a warrantless arrest provision in their state statute, they may not enter a person's *residence* to arrest him without a warrant absent consent or exigent circumstances. Absent these exceptions, police also may not enter the residence of a third party to arrest an offender unless they obtain a search warrant. (See footnote b to Figure 13.) However, in actual practice, these due process rights do not usually limit the ability of law enforcement officers to arrest violators in the home when a violation is a misdemeanor or criminal contempt. This is because in most cases either the victim has given the necessary consent to enter her home or a neighbor has called to report a crime in progress – and police may enter a dwelling without a warrant to prevent immediate danger to life or the likely escape of a suspect (*State v. Lloyd* 606 P.2d 913, 918 [1980]). Police may also search for and arrest a violator who has fled the scene in states that both provide for warrantless arrest and make the offense a misdemeanor or criminal contempt.

In states that lack such authorization, police officers need to be encouraged to seek arrest warrants under these circumstances. Findings from a pilot study suggest that when one police department sought warrants to arrest batterers who had fled the scene, the incidence of repeat abuse reported by victims appeared to be reduced compared to when the department did not attempt an arrest.[8]

Police also may need to be reminded that even if there is no basis to arrest for a violation (as when the offense is civil contempt), they should make a probable cause arrest for any aggravated assault and make an arrest for any misdemeanor assault they have witnessed (or have probable cause to believe occurred for the 31 states that authorize or require warrantless arrest for domestic violence).

In addressing the importance of aggressive enforcement policies, a number of court decisions can be cited that provide convincing legal authorization for police to arrest batterers who violate protection orders. In a widely publicized case, a Connecticut appeals court ruled in *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D.Conn. 1984), that the nonperformance or malperformance of official duties by a municipality and its police officers denied a victim of domestic violence equal protection of the law. The court ruled that police may not treat instances of domestic violence less seriously than other types of assaults simply because of the relationship between the persons involved. A municipality and its law enforcement officers may no more refrain from interfering in domestic violence than in any other kind of violence. As a result, the court upheld a $3.2 million damage award to the seriously injured victim and $300,000 in damages to her son.

Several courts have also ruled that law enforcement officers have a duty specifically to enforce civil protection orders. As long ago as 1966, an appeals court in *Baker v. City of New York*, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966) ruled that a person issued a protection order is owed a special duty of care by the police department. In *Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137 (1983), a more recent case based on the Oregon Abuse Prevention Act of 1977, the Oregon Supreme Court held that a peace officer has a duty to arrest without a warrant a person whom the officer has probable cause to believe has been served with a protection order and has subsequently violated that order. Moreover, the court ruled that the police department could be held liable in a civil suit for damages based upon the failure to protect the victim by arresting the offender. Noting that the existence of a restraining order created a special relationship between the injured plaintiff and the police officer, the court held that officers who knowingly fail to enforce such orders are potentially liable for the resulting emotional and physical harm to the intended beneficiaries of the orders.[9]

Kubitscheck v. Winnett et al., No. 8587, slip op. at __ (Or. Feb. 20, 1980), is an Oregon case involving police who had declined to arrest when first called to the scene of a protection order violation but later arrested the offender after a subsequent violation the same night. The case was settled for an undisclosed but substantial sum of money. In *Soto v. County of Sacramento*, No. 332313, slip op. at __ (Cal. Sup. Ct. 1986), the California Superior Court ruled in a mandamus action that the sheriff had a mandatory duty to enforce a restraining order held by a battered woman – and that her husband's claim that he had lived in the home after she had obtained the order did not affect the validity of the order.

Law enforcement agencies in Texas and New York agreed to consent decrees after class action suits were brought against them for alleged failure to act in cases of domestic violence. In *Lewis v. Dallas*, No. CA3-85-0606-T, slip op. at (N.D. Tex. 1985), a battered woman in Dallas, alleging that the police department denied her due process and equal protection, sought injunctive relief and $500,000 in damages. The 1987 settlement by consent decree provided for nominal damages for the named plaintiffs and mandatory police arrest if there is probable cause to believe (among other offenses) that a court order has been violated. In 1978, the New York City Police Department signed a consent decree after twelve married battered women filed a class action complaint in the New York County Supreme Court (*Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 [Sup. Ct. 1977], *rev'd on other grounds*, 64 A.D.2d 582, 407 N.Y.S.2d 165 [1978], *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 [1979], *appeal denied*, 48 N.Y.2d 646, 421 N.Y.S.2d 1032, 396 N.E.2d 488 [N.Y. 1979]). The police department obligated itself to arrest when it had reasonable cause to believe that a husband violated an order of protection. The department agreed to make supervisors at police precincts responsible for making sure that patrol officers comply with all requirements of the agreement.

It is amply clear that police departments may not with impunity disregard their responsibility to enforce protection orders. Judges can thus perform a valuable service by emphasizing that appropriate arrest policies, with suitably clear and detailed guidelines, will serve not only the judicial process but the law enforcement agency as well. At the same time, judges can periodically update law enforcement agency legal advisors regarding relevant case law as new cases involving police arrest powers are appealed.

Providing information to victims

Most victims of domestic abuse have no idea what legal recourse is available to them, and many are unlikely to find out unless a police officer tells them. As a result, statutes in 30 states require law enforcement officers to provide victims with information about the protection order process. For example, Maine's statute requires peace officers to provide the victim with "immediate and adequate written notice of his rights, which shall include information summarizing the procedures and relief available to victims of the family or household abuse. . . ." In Massachusetts, the information to be provided to the victim (which is specified word-for-word in the statute) must be provided in written form in Spanish and English, as well as read to the victim in English.

The duty to inform victims of their rights may be incorporated into a police department's general orders. For example, in Philadelphia, Directive 90 of the Philadelphia Police Department general orders requires officers to explain the civil protection order option to victims and the procedure for obtaining an emergency order after normal court hours. Police departments at all the study sites provide officers with information sheets or cards explaining protection orders to distribute to victims.

Many victims do learn about protection orders from police officers. Ninety percent of the victims who appear at the Philadelphia Family Court for protection orders say they have been referred by the police. However, reports from other victims suggest that not all officers provide this information. By encouraging officers to regularly provide information regarding the protection order process, judges can help provide victims with an opportunity to seek court assistance—before the situation escalates dangerously.

Securing the victims' safety

Many protection order statutes require police to provide other forms of assistance to victims. (See Figure 12.) For example, Illinois officers are required by statute to "immediately use all reasonable means to prevent further abuse," including:

> (1) Providing or arranging transportation for the victim of abuse to a medical facility for treatment of injuries or to a nearby place of shelter or safety, or after the close of court business hours. . . to the nearest available circuit judge. . . so the victim may file a petition for an emergency order. . . .
>
> (2) Accompanying the victim of abuse to his or her place of residence for a reasonable period of time to remove necessary personal belongings. . . .
>
> (3) Offering the victim immediate and adequate information of his or her rights. . . one referral to a social service agency, and the officer's name and badge number; and
>
> (4) Arresting the abusing party where appropriate.

In Massachusetts, domestic violence victims have the right to request that the officer remain at the scene until the victim and any children can leave or their safety is otherwise insured. In Michigan, officers must provide a list of local emergency shelter programs, with phone numbers, including a statewide 24-hour hotline. As in many other states, New Hampshire peace officers are directed to "use all reasonable means to prevent further abuse," but this particular statute also protects officers against civil liability for acts and omissions in rendering emergency care or transportation, provided they do not exercise gross negligence or willful misconduct.

Serving orders

In most jurisdictions, law enforcement officers are responsible for serving protection orders. Many officers charged with

process serving read the key terms of a protection order to the defendant as part of service. For example, when the order evicts the defendant from the home, the police officer in Portland, Maine, charged with serving orders tells the respondent that he is to have absolutely no contact with his partner and is to stay away from the joint residence—even if he believes he has been invited back by the victim; a violation, the officer warns, could result in an arrest. The officer also informs the defendant of his right to a hearing and notes the hearing date. By reading the order aloud, an officer can compensate for any literacy barriers a respondent may have and can preclude future claims by a batterer that he did not understand the protection order.

Because a civil protection order is not enforceable until it has been served—and the intervening time can create serious danger of renewed or even increased violence—quick service is critical. As a result, a number of statutes have expedited service requirements, as in the Illinois statute:

> The summons... shall be served by a sheriff or other law enforcement officer at the earliest time and shall take precedence over other summonses except those of a similar emergency nature.

Even where a statutory mandate is provided, prompt service requires regular oversight and an appropriate allocation of resources. What may seem quick to a peace officer with numerous matters to serve may be dangerously long in light of the threat of renewed violence which prompt service can sometimes prevent. However, some sheriffs are beginning to realize the crime prevention potential prompt service can have through reducing the time period during which the offender can continue to abuse his partner without the deterrent effect of a court order enjoining such behavior.

Judges can help insure prompt service by making sure the sheriff knows the court considers this responsibility a top priority. When a victim comes into one court for an emergency order, the judge sometimes has a staff member telephone the sheriff to have the order served within the hour. Law enforcement officers suggest that service can be expedited if the victim provides as much information as possible regarding the potential whereabouts of the respondent, including times when the batterer is likely to be at each location. To avoid giving the victim a false sense of protection, some judges make clear to petitioners that a protection order is not enforceable until it has been served.

Because of delays in service in some jurisdictions, police officers may find themselves responding to domestic violence situations in which the batterer's behavior would constitute a violation of an outstanding protection order but the order has not yet been served. State statutes or local practice may establish proper police procedures when such cases arise. In Springfield, officers at the scene have been instructed to detain the offender until a sheriff's deputy can arrive to serve the order. The Colorado domestic abuse statute states that:

> [I]f any person named in an order issued pursuant to this section has not been served personally with such order but has received actual notice of the existence and substance of such order from any person, any act in violation of such order may be deemed by the court a violation of such order and may be deemed sufficient to subject the person named in such order to any penalty for such violation.

Similarly, a police trainer in Nashville instructs officers that, upon verification of an outstanding protection order, *they* may inform the respondent named in the order of the existence of the order. At that point, if the offender refuses to leave despite an order prohibiting him from the household (or if he returns later), the officer can arrest the offender for violating the order. The trainer also noted that officers can make their own determination about whether or not the offender has knowledge of the protection order (for example, if the victim credibly reports that she has notified him).

Another option is for the court, at the emergency hearing, to advise victims to obtain a certified copy of the emergency order before leaving the court and keep the original and a photocopy with them at all times. Then, if the offender approaches and threatens them before being served, they will have a certified order to hand to an officer called to the scene—who can then serve the offender.

In cases where peace officers cannot accomplish personal service, alternatives include public posting, sending the order by certified mail, or permitting personal service by other parties. For example, the Minnesota Domestic Abuse Act permits service by publication of the full notice in a qualified newspaper. The Act authorizes this alternative to personal service only if:

> the petitioner files with the court an affidavit stating that an attempt at personal service made by a sheriff was unsuccessful because the respondent is avoiding service by concealment or otherwise, and that a copy of the petition and notice of hearing has been mailed to the respondent at the respondent's residence or that the residence is not known to the petitioner.

The Intrafamily Rules of the District of Columbia permit service by leaving copies of the order at the offender's home or usual place of abode "...with a person of suitable age and discretion then residing therein who is not a party."

Police training

As part of a formal and closely monitored court policy regarding expected police handling of protection order violations, a number of judges stressed that police training is essential to inform officers of their responsibilities. One goal of police training should be to impart knowledge about civil protection orders so officers can explain the protection order option available to victims. A more difficult goal of training, however, is to make sure police officers enforce the laws regarding violations of protection orders. Training can help accomplish this objective by explaining (1) the statutory requirements regarding enforcement, (2) police liability for failure to enforce, and (3) the advantages strict enforcement can have for officers.

Training in the statutory requirements related to enforcement is important because the law varies widely between states. For example, police training would focus on the affirmative duty imposed in states which call for mandatory arrest if the officer at the scene has probable cause to believe that a protection order has been violated. If a civil protection order has been violated but the respondent has fled the scene before the police arrive, police can at least file a report of the alleged violation to have documentation in any future court proceedings involving the same parties. The ability of officers to search for the offender depends on police resources, knowledge of where he may have fled, and the seriousness of the violation.

Several police officers reported they were more inclined to enforce orders once they understood their legal liability for failure to do so. A police officer with a law degree explains officers' liability as part of in-service training in Nashville. Recent case law on police liability for failure to enforce protection orders has been reviewed above (see section on Arresting Violators). As noted earlier, in *Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137 (1983) the Oregon Supreme Court ruled that police officers who knowingly fail to enforce civil protection orders are liable for the resulting emotional and physical harm to the intended beneficiaries of protection orders.

Police training can emphasize that civil protection orders can help officers in handling domestic violence cases. Several officers reported that being able to offer the victim information about civil protection orders reduced their frustration over not being able to do anything to help in situations where the victim was reluctant to file criminal charges against the offender.

Training can also address officers' discomfort in arresting an offender who may not have further abused the victim but who has violated the order by appearing in the home. Trainers can provide reassurance that this type of violation merits arrest because:

- It represents clear contempt for the criminal justice system.
- Even if there has been no physical violence, the mere presence of the offender in the home may be terrifying to the victim and, indeed, may be intended to intimidate.
- The offender's presence creates a tremendous opportunity for further abuse of the victim at any time, thus making eviction crucial to crime prevention.

Statutory language on police behavior in specific situations can be enhanced by police department general orders which further clarify possible areas of confusion arising under the statute. For example, a departmental policy of mandatory arrest, as exists in Allentown, Pennsylvania, leaves no doubt about the appropriate police response when probable cause is met, thereby reducing the "gray area" that police otherwise would encounter in responding to protection order violations. The Allentown Police Department simply requires officers to arrest *any* offender who is found in the home if a valid protection order that evicts the batterer is in force. Similarly, the Duluth Police Department general order on domestic violence emphasizes that "...state law requires an arrest regardless of whether or not the offender was invited back into the home...."

Judicial Training

While most judges in the study sites felt comfortable implementing their state civil protection orders statute, many had questions about particular parts of the statute or how they should handle particularly problematic cases. Some judges, while familiar with the powers granted them by statute, were uneasy exercising their full authority.

Because of these questions and concerns, many judges welcomed the idea of judicial training on the use and enforcement of civil protection orders. Judges suggested that the training should include:

- A thorough analysis of the state statute, including conditions of eligibility, relief that can be granted in a protection order, and the standard of evidence to be applied in issuing orders and holding violation hearings.
- An explanation of how civil protection orders, by evicting the batterer and by giving police increased authorization to arrest abusers, can contribute to maintaining law and order.
- An explanation of the dynamics of battering and

the psychosocial and institutional factors that sustain it. This may help explain why victims may return to court repeatedly for new protection orders.

- A discussion of how judges can best use their authority in the courtroom to intervene effectively in domestic violence situations.

Providers of judicial training vary by jurisdiction. In Portland, Oregon, the chief administrative judge arranged for both a Legal Services attorney and an attorney in private practice with experience dealing with domestic violence victims to provide three to four hours of training for judges. The chief administrative judge in Baltimore requires all new judges to attend a half-day orientation on domestic violence at a local shelter. Other judges reported receiving training at state judicial conferences.

Conclusion: Collaborative Service Delivery

Domestic violence requires a coordinated response from each element of the justice system, acting in concert with local social service, mental health, and advocacy group representatives. Civil protection orders, as part of the solution, cannot be used and enforced fully by any one of these groups without cooperation from the others. For example, law enforcement officers are reluctant to file reports or make arrests if they do not believe the prosecutor will follow through, or that the judge will impose appropriate sanctions. Judges, in turn, are unlikely to mandate batterer counseling for the respondent unless the community provides quality services in this area.

The Duluth system of inter-agency cooperation illustrates how a range of involved service providers can collaborate. The Duluth Domestic Abuse Intervention Project, a local non-profit community-based organization, strives to make the community responsible for preventing domestic violence by working with both the justice system and the social service system to convey a consistent message that domestic violence is a crime that will not be tolerated. The Domestic Abuse Intervention Project also provides counseling groups for batterers, support groups for victims, and training for judges and police. Since its inception, the project has worked with the court system to establish, implement, and monitor court standards and procedures for handling domestic violence cases. One particularly innovative judge was instrumental in promoting a community-wide response by speaking at local functions and seminars, and by assisting with the training of other judges, police, and other groups. He was also active in changing court procedure for handling domestic violence cases. The collaborative approach that was developed is being continued by the Duluth judges, who meet quarterly with the victim advocacy group to discuss mutual problems and progress.

The Community Response Program in Portland, Maine, is implementing a three-year plan using Duluth as a model. The first year, which has been completed, focused on improving law enforcement response to domestic violence situations by developing effective police procedures and providing officer training. The goal of the second year is the establishment of counseling programs for offenders and improved coordination of social service agencies (including religious and charitable organizations). The focus of the third year will be to develop a better system of communication and coordination between community social service organizations and judges and prosecutors.

Inter-agency cooperation between community service groups (including shelters) and local police departments can also be beneficial. Service groups can serve as a resource to the police, who are generally not equipped to provide crime victims with emergency services—but who nonetheless face a constant imperative to help locate those services in emergency situations. In some communities, victims are identified and reached by community outreach programs thanks to police willingness to share case information about victims with concerned organizations. The Community Response Program in Portland and the Domestic Abuse Intervention Program in Duluth have access to police dispatch records and investigation or arrest reports, which are then used to contact the victims to provide information about protection orders and offer assistance. In the first five months of 1987, the Community Response Program contacted 294 victims in this manner. Because judges exercise considerable authority with police departments and advocate groups, they are in a unique position to serve as leaders in encouraging the two to develop a collaborative approach.

Endnotes

1. The count of states with civil or criminal contempt as the offense when a protection order has been violated reflects the opinion of a practicing attorney in each state based on the language of the civil protection order statute and other applicable state legislation. However, it is possible that these attorneys also based their interpretation on how a violation is handled in the local jurisdiction in which they practice law.

2. Silas Wasserstrom, personal communications, July 19 and 20, 1989, and Wayne LaFave, personal communication, July 20, 1989. The rationale for this opinion is that "...the common requirement of a warrant for misdemeanors not occurring in the [arresting peace officer's] presence is not grounded in the Fourth Amendment...[T]he Supreme Court...has never held a warrant for lesser offenses occurring outside the presence of an officer is constitutionally required." (Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 2, 2nd. ed. St. Paul, Minnesota: West Publishing, 1986, p. 402). Furthermore, as long as the constitutional requirements for probable cause are satisfied, the U.S. Supreme Court has left it to the states' discretion (1) to decide what arrest powers to grant peace officers within their jurisdictions (as long as, absent consent or exigent circumstances, no one is arrested without a warrant where they are living) and (2) to make any crime an arrestable offense. (See, for example, J. Steven's dissent in *Robbins v. California*, 435 U.S. 420 [1981], p. 450, and opinion of Justice Steward in *Gustafson v. Florida*, 414 U.S. 260 [1973], pp. 266-267.)

3. See endnote 1.

4. Attorney General's Task Force on Family Violence, Final Report (Washington, D.C.: U.S. Department of Justice, 1984), p. 36.

5. Barbara E. Smith, *Non-Stranger Violence: The Criminal Court's Response* (Washington, D.C.: National Institute of Justice, 1983), p. 96.

6. The potential for punitive action if a batterer in counseling reveals he has continued to abuse his partner may induce some participants to lie about their behavior. However, there is no evidence that men conceal their abusive behavior any more in the Duluth group sessions than in groups where there is no sanction. In addition, Duluth staff believe merely reprimanding or warning the batterer who reveals renewed violence conveys a message that the violence is not taken seriously. Furthermore, the terms of the batterer's probation agreement require that any information he reveals of this nature be reported by the program to the court.

7. Jan Mickish, "In Aurora, 'Everyone Hated Domestics,'" *Law Enforcement News*, November 10, 1987.

8. Franklyn W. Dunford, David Huizinga, and Delbert S. Elliott, The Omaha Domestic Violence Police Experiment, Final Report (Washington, D.C.: National Institute of Justice, 1989).

9. However, in *Sorichetti v. City of New York* (65 N.Y.2d 461, 482 N.E. 2d 70, 492, N.Y.S.2d 591 [1985]), the trial court instructed the jury not to base the special duty on the order of protection in isolation but rather in combination with the police officers' knowledge of the defendant's violent nature and the police response to the alleged violation of the protection order. The New York Court of Appeals on interlocutory appeal unanimously affirmed that the trial court's charge to the jury was proper (*Sorichetti*, 65 N.Y.2d at 482, N.E.2d at 72, 492 N.Y.S.2d at 593).

APPENDIX:

Citations to Protection Order Statutes by State

Appendix: Citations to Protection Order Statutes by State

ALABAMA
ALA.CODE §§30-5-1-11(Supp. 1986) (Protection from Abuse Act)

ALASKA
ALASKA STAT. §§25.35.010–.060 (1963 and Supp. 1986)

ARIZONA
ARIZ.REV.STAT.ANN.§§13-3602 (Supp.1987-1988)

ARKANSAS
No provision

CALIFORNIA
CAL.CODE CIV.PROC. §540-553,527.6

COLORADO
COLO.REV.STAT. §§14-4-101–105 (Supp. 1985)

CONNECTICUT
CONN.GEN.STAT.ANN. §46b-15, §46b 38a-f (West Supp. 1986)

DELAWARE
DEL.CODE ANN.tit.10, §§921,950 (1975 & Supp. 1984)

FLORIDA
FLA.STAT.ANN. §741.30 (West 1986) amended 1987 Legislative Session

GEORGIA
GA.CODE ANN. §§53-701–706 (Supp. 1986) (Procedures for Prevention of Family Violence)

HAWAII
HAWAII REV.STAT. §§586-1–11 (Supp. 1984) (Domestic Abuse Protective Orders)

IDAHO
IDAHO CODE, Ch.63, tit. 39-6301-6317 (1988 Legislative Session)

ILLINOIS
ILL.REV.STAT.Ch.40 §§2311-1 et seq., and Ch. 38 §§1124-1 et seq. (Smith Hurd Supp. 1986) (Orders of Protection)

INDIANA
IND.CODE ANN. §§34-4-5.1-1–1-6 (West Supp. 1986)

IOWA
IOWA CODE ANN. §§236.1–.18 (West 1985 & Supp. 1986) (Domestic Abuse Act)

KANSAS
KAN.STAT.ANN. §§60-3101–3111 (Vernon 1983) (Protection from Abuse Act)

KENTUCKY
KEN.REV.STAT. §§403.715–.785 (1984 & Supp. 1986)

LOUISIANA
LA.REV.STAT.ANN. §§46:2131–2142 (West 1982 & Supp. 1986)

MAINE
ME.REV.STAT.ANN.tit.14, §761–770 (1981 & Supp. 1987)

MARYLAND
MD.FAM.LAW CODE ANN. §§4-501–510 (Supp. 1986);
MD.ANN.CODE, Article 27, §594B (Supp. 1987)

MASSACHUSETTS
MASS.GEN.LAWS ANN.ch.209A, §§– 9 (Supp. 1986) (Abuse Prevention)

MICHIGAN
MICH.COMP.LAWS ANN. §552.14 (Supp. 1986) (Injunctive Order from Domestic Abuse).

MINNESOTA
MINN.STAT.ANN. §518B.01 (Supp. 1986) (Domestic Abuse Act)

MISSISSIPPI
MISS.CODE ANN. §§93-21-1–29 (Supp. 1986) (Protection from Domestic Abuse Law)

MISSOURI
MO.ANN.STAT. §§455.010–.230 (Vernon Supp. 1986)

MONTANA
MONT.CODE ANN. §§40-4-121–125 (1985)

NEBRASKA
NEB.REV.STAT. §§42-901–927 (1978) (Protection from Domestic Abuse Act)

NEVADA
NEV.REV.STAT.ANN. §33.017–.100 (1986)

NEW HAMPSHIRE
N.H.REV.STAT.ANN. §§173-B: 1–11a (Supp. 1986) (Protection of Persons from Domestic Violence)

NEW JERSEY
N.J.STAT.ANN. §§2C:25-1–16 (West 1982 & Supp. 1986) Amended 1988 Legislative Session (Prevention of Domestic Abuse)

NEW MEXICO
N.M.STAT.ANN. §31-1-7(19–)

NEW YORK
N.Y.FAM.CT.ACT §§153-C–217,812 (Consol. 1983 & Supp. 1987)

NORTH CAROLINA
N.C.GEN.STAT. §§50B-1–8 (1984) (Domestic Violence)

NORTH DAKOTA
N.D.CENT.CODE §§14-07.1–08 (1981 & Supp. 1985)

OHIO
OHIO REV.CODE ANN. §§3113.31 et seq. (Page's 1980 & Supp. 1987)

OKLAHOMA
OKLA.STAT.ANN.tit.22, §§60–60.7 (West Supp. 1987) (Protection from Domestic Abuse Act)

OREGON
OR.REV.STAT. §§107.700–.730 (1981) (Amended 1987) (Family Abuse Prevention Act)

PENNSYLVANIA
35 PA.CONS.STAT.ANN. §§10181-10190 (Purdon Supp. 1988) (Protection from Abuse Act)

RHODE ISLAND
R.I.GEN.LAWS §§15-15-1–7, §8-8-1 et seq. (Supp. 1986) (Amended 1988) (Domestic Abuse Prevention)

SOUTH CAROLINA
S.C. CODE ANN. §§20-4-10–130 (Law. Co-op. 1985) (Protection from Domestic Abuse Act)

SOUTH DAKOTA
S.D. CODIFIED LAWS ANN. §§25-20-1–13 (1984 & Supp. 1986) (Protection from Domestic Abuse)

TENNESSEE
TENN.CODE ANN. §§36-3-601–614 and §§407-103 (1982 & Supp. 1987)

TEXAS
TEX.FAM.CODE ANN. §§71.01–.19 (Vernon 1986) (Protective Orders); TEX.PENAL CODE §25.08

UTAH
UTAH CODE ANN. §§30-6-1–10 (1953 as amended & Supp. 1986) (Spouse Abuse Act); UTAH CODE CRIM.PROC. §§77-3-1-12

VERMONT
VT.STAT.ANN.tit.15, §§1101–1109 (Supp. 1985) (Abuse Prevention)

VIRGINIA
VA.CODE §§16.1-253.1, 16.1-279.1 (Supp. 1986)

WASHINGTON
WASH.REV.CODE ANN. §§26.50.010–.902 (1986)

WEST VIRGINIA
W.VA.CODE §§48-2A-1–10 (1986) (Prevention of Domestic Violence)

WISCONSIN
WIS.STAT.ANN. §§813.12 (West Supp. 1986)

WYOMING
WYO.STAT.ANN.§§35-21-101–107 (Supp. 1986, revised 1988) (Family Violence Protection Act)

DISTRICT OF COLUMBIA
D.C.CODE ANN. §§16-1001–1006 (1981 & Supp. 1986)

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-221/259